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2 CAL. UNREP.

California. Supreme Court

CALIFORNIA UNREPORTED CASES

BEING THOSE

DECISIONS DETERMINED IN THE SUPREME COURT AND THE DISTRICT COURTS OF APPEAL OF THE STATE OF CALIFORNIA

BUT NOT

OFFICIALLY REPORTED

WITH

ANNOTATIONS

SHOWING THEIR PRESENT VALUE AS AUTHORITY

REPORTED AND EDITED BY

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Of the San Francisco Bar

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CASES DETERMINED

IN THE

SUPREME COURT OF CALIFORNIA

BUT NOT

OFFICIALLY REPORTED.

C. C. OAKLEY, Respondent, v. J. F. STUART, Defendant; ISAAC MILLER, Intervener and Appellant.*

No. 4790; December 11, 1875.

School Lands—Application to Purchase.—Section 3495 of the Political Code, referring to applications for the purchase of school lands, is mandatory in requiring the applicant to state "that there is no occupation of such lands adverse to any he has"; or, in case there is such an occupant, in requiring the affidavit to show that the township has been sectionized three months, and that the adverse occupant has been in occupation more than sixty days.

APPEAL from First Judicial District, Santa Barbara County.

W. C. Stratton for respondent; E. Fawcett and R. M. Dillard for appellant.

RHODES, J.—This is an action to determine a contest arising in the state surveyor general's office, for the purchase of a portion of a sixteenth section of public school lands belonging to the state. The lands were surveyed in the field and the township plat approved in the year 1861, and the plat was returned to the office of the register of the local land office on the eleventh day of April, 1873. Applications for the purchase of the land were made by Linebaugh, Stuart and the plaintiff. That of the plaintiff was in all respects sufficient, and he is entitled to purchase the land

*For subsequent opinion, see Oakley v. Stuart, 52 Cal. 521.

if those of Linebaugh and Stuart, which were prior in point of time, were for any reason invalid.

The application of Stuart was made on the twelfth day of April, 1873, under the provisions of section 3495 of the Political Code. His affidavit stated that there was no occupation of the lands adverse to any he had, and failed to state that the township had been sectionized or that the plaintiff was in the adverse occupation of the lands sought to be purchased. The court found that the plaintiff entered into the possession and occupancy of a large portion of the lands between January 1 and April 1, 1873, and ditched and fenced the same, and cultivated and sowed grain thereon, and continued to occupy the same to the time of the trial of the action. The section of the Political Code above referred to requires the affidavit of the applicant to state "that there is no occupation of such lands adverse to any he has, or if there is an adverse occupant, then the affidavit must show that the township has been sectionized three months, and that the adverse occupant (giving his name) has been in such occupation more than sixty days." The court below was of the opinion that the affidavit was insufficient under the law and invalid, because it did not state the fact that the lands were in the adverse occupation of the plaintiff. That conclusion is, in our judgment, correct. It is fully sustained by Woods v. Sawtelle, 46 Cal. 390, the affidavit in that case exhibiting the same defect as that now before us: See, also, Hildebrand v. Stewart, 41 Cal. 387. It may be true, as contended by the intervener, that the words of section 3497, Political Code, "any person settling upon a sixteenth or thirty-sixth section" mean one who has made a "settlement" upon the land within the meaning of the pre-emption laws of the United States, and that such person could not claim a priority in the purchase unless he complied with the provisions of the code, but that question is not involved in the inquiry as to whether the affidavit of Stuart is valid. For the purpose of that inquiry, it is immaterial whether another person has lost his priority or right in any other respect. The failure of the affidavit to state the required facts renders it invalid.

The application of Linebaugh was made on the sixth day of January, 1871, which was after the township plat had been

approved by the surveyor general, but before it had been returned to the office of the register of the local United States land office. This presents the principal question in the case, which is, whether by the laws of this state then in force the sixteenth sections were subject to sale before the township plat had been filed in the register's office. The application was made under the act of March 28, 1868 (Stats. 1867–68, p. 507), and the amendments thereto of 1869–70 (Stats. 1869–70, p. 875). The fifty-second section provides that "whenever a resident of this state desires to purchase any portion not less than the smallest legal subdivision, of a sixteenth or a thirty-sixth section of any township in the state, which has been surveyed by authority of the United States, he or she shall make an affidavit," etc. It was held in Collins v. Bartlett, 44 Cal. 382, that "under the public land system of the United States, lands are not treated as surveyed until the township plat is approved by the surveyor general and returned to the proper register's office." Upon this proposition there is no room for doubt, and we are of the opinion that the statute in providing for the sale of lands which have been "surveyed by the authority of the United States" refers to lands which, under the land system of the United States, are deemed to have been surveyed. It was accordingly held in Rooker v. Johnson [49 Cal. 3], No. 4359, October term, 1874, that applications to purchase which had been made after the land had been surveyed in the field and the township plat had been approved, but before it had been returned to the register of the local land office, were invalid.

The act of Congress of September 4, 1841, provides for the location by the United States of the five hundred thousand acres granted to each state for the purposes of internal improvements as follows: "Said location may be made at any time after the lands of the United States, in said states respectively, shall have been surveyed according to existing laws." In respect to selections made by this state in part satisfaction of that grant, it has repeatedly been held that a valid selection could not be made until the approved township plat had been returned to the proper register's office, although the statutes of the state did not in terms require that the selections should be made after the township plat had been returned: See Terry v. Megerle, 24 Cal. 609, 85 Am. Dec. 84;

Megerle v. Ashe, 33 Cal. 82; Poppe v. Athearn, 42 Cal. 617; Collins v. Bartlett, 44 Cal. 382.

It is required by section 12 of the act of 1868, above referred to, that the state surveyor general shall, immediately after an application to purchase is made, apply to the proper United States land office to have the lands described in the application "accepted in part satisfaction of the grant under which it is sought to be located." The applications mentioned in that section include all applications mentioned in the previous section, among which are those for the purchase of portions of the sixteenth section. It may be true, as urged by the intervener, that the acceptance or approval by the officers of the land department of the location or sale by the state of a sixteenth section will not be given, or if given, will subserve no useful purpose; but however that may be, the fact that such acceptance is required, and that it cannot be had until the plat is returned to the proper register's office, tends strongly to show that it was not contemplated by the statute that a sixteenth section should be sold prior to the return of the township plat to the register's office. In corroboration of this construction it may be noticed that section 52 provides, among other things, that if there shall be adverse occupation, then he shall state (in his affidavit for the purchase of the lands) that "the township has been sectionized and subject to pre-emption three months or over." It will not be questioned that the public lands are not subject to pre-emption until the township plat is filed.

It is insisted that the proviso to the twelfth section as amended in 1870, to the effect that purchases of portions of the thirty-sixth sections may be made where "township and other lines have been established," but the township line has not been sectionized, militates against the construction already stated; but we do not think that a provision for the sale of a section before its lines are established, before the section has any legal existence (Robinson v. Forrest, 29 Cal. 325; Middleton v. Low, 30 Cal. 605), tend to show at what stage in the proceedings other lands are deemed to be surveyed within the meaning of the statute, and become subject to sale under the laws of the state.

Judgment affirmed.

CROCKETT, J.—I think Stuart's application to purchase was invalid, for the reasons stated in the opinion of Mr. Justice Rhodes. Linebaugh's application was made under the act of March 28, 1868, by the eleventh section of which the state surveyor general is constituted the agent of the state for the sale of certain lands belonging to the state which are enumerated in that section, amongst which are included the sixteenth and thirty-sixth sections. Section 12 provides that when an application is made to purchase any of the lands "described in the preceding section," the surveyor general shall communicate immediately with the proper United States land office and ask that the lands described in the application shall be accepted in part satisfaction of the grant under which it is sought to be located; and when the acceptance of the register of the United States shall have been obtained, the surveyor general shall issue to the applicant a certificate authorizing the county treasurer to receive payment. From this provision it is evident that the certificate cannot be issued until the acceptance of the register has first been had; and it is equally clear that the register cannot accept the application until the approved plat has been filed in his office. He is then for the first time brought into such relations with the subject matter as to enable him to act understandingly. But it is said that by the act of Congress of March 3, 1853, the sixteenth and thirty-sixth sections were granted absolutely to the state, and that so soon as these sections were located by an official survey by the United States, the title of the state immediately attached and became absolute to the particular land included in these sections as thus located. Hence it is argued it would be absurd to require the United States register to approve an application to purchase land included in these sections which belonged to the state with an absolute power of disposition, and in the disposal of which the United States were in no wise interested. It is perhaps a sufficient answer to this suggestion that, whether absurd or not, the statute explicitly requires the application to be accepted by the register, and the legislature has the power to prescribe the conditions on which the lands of the state may be purchased. But the act of March 3, 1853, authorized pre-emption claims to be taken up on unsurveyed lands, and the seventh section provides that, when

a pre-emptioner shall settle on unsurveyed land which shall afterward be included in a sixteenth or thirty-sixth section, the state shall select other lands in lieu of that so taken up by the pre-emption claimant. In view of this contingency, I discover nothing absurd in requiring the application to purchase to be accepted by the register who, with the approved plat before him, can determine from the records of his office whether the land is claimed by a pre-emptioner. This view is fortified by section 52 of the act of March 28, 1868, which requires the applicant to state in his affidavit that there is no adverse occupation, or if there be, "that the township has been sectionized and subject to pre-emption three months or over." This contemplated that before the land was surveyed, and at a time when unsurveyed lands were subject to pre-emption, the land may have been taken up as a pre-emption claim, in which event the pre-emptioner was allowed three months after the approved plat was returned to the register within which to file his declaratory statement. All these provisions would seem to establish beyond doubt that under the act of 1868 there could be no valid application to purchase land included in a sixteenth section until after the approved plat was returned to the register. I therefore concur in the judgment.

We concur: McKinstry, J.; Niles, J.

GEORGE K. PORTER, Appellant, v. STEPHANESCO GARRISSINO, Respondent.*

No. 4676; December 29, 1875.

Special Assessment.—A Judgment had Without Notice to the Owner of property affected by it, in an action for an assessment for the construction of a sewer, will not bind his interest, and a sale in pursuance of such judgment will not pass his title.

Judgment—Service of Process.—If a Woman Whose Christian Name is Henrietta is sued under the initial H., and the sheriff returns the summons as served "by delivering to Harriet . . . . one of

*For subsequent opinion, see Porter v. Garrissino, 51 Cal. 559.

the defendants sued as H. . . . . ," and it does not appear that Henrietta was served at all, judgment thereupon will not affect the latter or her property.

APPEAL from Nineteenth Judicial District, San Francisco County.

B. S. Brooks for appellant; McAllister & Bergin for respondent.

By the COURT.—The judgment in the action of Olwell v. Corbett, for the recovery of the assessment for the construction of a sewer, did not bind the interest of the plaintiff in the premises in controversy. The statute of April 25, 1863, provides for an action against the owner, but it does not declare that notice to the person in possession shall be notice to the owner out of possession; and if it did so provide, there is nothing in the complaint in that case showing that the defendants therein named were in the possession of the premises. It is obvious that a judgment without notice to the owner, either actual or constructive, will not affect his interest, and consequently that a sale in pursuance of such judgment would not pass his title. It appears that John C. Corbett, one of the defendants in that action, had parted with all his title to the premises before the action of Olwell v. Corbett was commenced.

The other defendant in that action, Henrietta Corbett, held an undivided interest in the premises at the commencement of the action. She was sued by the name of H. Corbett. The sheriff returned the summons as served "by delivering to Harriet Corbett, one of the defendants sued as H. Corbett, personally in the county of San Mateo, a copy of said summons," etc. The judgment was rendered against John C. Corbett and H. Corbett, and in this action the court found that H. Corbett named in said judgment was Henrietta Corbett, but it is not found that Harriet Corbett is Henrietta Corbett, nor that the sheriff served the summons upon Henrietta Corbett. It not appearing that Henrietta Corbett was served with process in that action or that she appeared therein, the judgment did not affect her interest in the premises.

It is unnecessary to express any opinion upon the question as to whether McDermott should have been permitted to intervene in this action.

Judgment and order reversed and cause remanded for a new trial.

Wallace, C. J., did not express an opinion.

COLUMBUS C. HOPKINS, Respondent, v. CENTRAL PACIFIC RAILROAD COMPANY, Appellant.

No. 4884; February 7, 1876.

Railroads.—A Law Requiring Signals in Case of a Moving Train approaching a street crossing has no reference to the management of cars in the making up of freight trains and loading them between crossings.

APPEAL from Tenth Judicial District, Yuba County.

P. Van Clief for respondent; W. C. Belcher for appellant.

By the COURT.—The motion for a nonsuit was, under the circumstances, properly denied. But the court erred in giving to the jury the first instruction. The statute recited in that instruction has reference to the management of a train of cars in motion and approaching a street crossing, and provides that unless the required signal of its approach be sounded, as therein provided, the company shall be liable for all damages sustained.

But the statute has no applicability to the management of cars in making up freight trains and loading them between street crossings.

The failure to ring the bell or give the required signal under such circumstances is not, as in the other case, made negligence per se; but the question of negligence is to be determined by the application of general principles of law to the facts of the case. The instruction given had a tendency to

mislead the jury in this respect, and we think that for this reason a new trial should have been granted.

Judgment and order denying a new trial reversed and cause remanded for a new trial.

Rhodes, J., expressed no opinion.

MICHAEL CULLEN, Respondent, v. SOUTHERN PACIFIC RAILROAD COMPANY, Appellant.

No. 4704; February 7, 1876.

Carrier—Person Riding in Exposed Position.—If a law provides that in case a passenger on a railway train suffers injury "on the platform of a car or on any baggage, wood, gravel or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in the train . . . . such company shall not be liable for the injury, provided said company at the time furnished room inside its passenger cars sufficient for the accommodation of its passengers," it is immaterial that the law does not in express terms prohibit a recovery to a person so suffering an injury.

Carrier—Person Riding on Other Than Passenger Car.—In the trial of an action against a railroad company for injuries received by the plaintiff while riding on one of the defendant's cars, when in fact it was not a passenger car, and a law relieved a company observing certain conditions from liability for injuries received on other than passenger cars, an instruction asked by the defendant on the hypothesis virtually of the plaintiff being debarred from recovery under this law is not too broad merely for failing to state just what description of car it was the plaintiff was riding on.

APPEAL from Twentieth Judicial District, Santa Clara County.

Moore & Laine and Delmas & Leib for respondent; S. W. Sanderson for appellant.

By the COURT.—Section 48 of the act of May 20, 1861, providing for the management of the affairs of railroad companies, is as follows: "In case any passenger on any railroad

shall be injured on the platform of a car, or on any baggage, wood, gravel, or freight cars, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger cars then in the train, or in violation of verbal instructions given by any officer of the train, such company shall not be liable for injury; provided, said company at the time furnished room inside its passenger cars sufficient for the accommodation of its passengers."

At the trial the evidence for the defendant tended to show that at the time of the accident complained of the plaintiff had left the rear car, which was admittedly a passenger-car, and had gone into the forward car, next to the engine, and was at the time of the accident in the forward compartment of the forward car, which compartment the defendant at the trial insisted was a baggage-car within the intent of the statute just recited. The evidence for the defendant further tended to show that at the time the plaintiff left the rear car, and at the time of the accident, there was sufficient room inside the rear car for the accommodation of the plaintiff and all the other passengers on the train. The defendant also proved that in the rear car there was posted up a notice in the following words:

"TAKE NOTICE.

"Passengers are not allowed to stand on the platforms, or to ride on baggage, mail or express cars, or on the engine. Keep your head and arms inside the windows.

"A. N. TOWNE, Genl. Supt."

In this condition of its case the defendant asked the court below to give the jury the following instruction: "If the jury believe from the evidence that at the time of the accident in question there was posted up in a conspicuous place inside of the passenger-cars in the train on which the plaintiff was then traveling printed regulations of the defendant stating in substance that passengers were not allowed to ride in the baggage, mail or express cars, or on the engine; and if the jury further believe that at the time of said accident the plaintiff was either in the baggage, mail or express car, or on the engine of said train; and if they further believe that at that time there was sufficient room in the passenger-cars composing said train for the accommodation of all the passengers

then traveling thereon,—then I instruct you that the plaintiff cannot recover in this action."

This instruction was refused, and an exception was reserved by the defendant.

It is not suggested by the counsel for the respondent that the instruction thus refused appears elsewhere in the record to have been substantially given.

The argument made here in support of the refusal is that "the statute does not prohibit a recovery to persons riding in the mail or express cars, or on the engine."

The statute in terms provides, as we have seen, that in such case the company "shall not be liable for injury," and if the company be not liable for the injury, it is difficult to see how the plaintiff could recover.

It is next argued in support of the refusal of this instruction that it was too broad, in that there was no evidence tending to show that the car in which the plaintiff was when he was injured was a mail-car, or that the plaintiff was on the engine when the accident occurred.

But we think that the instruction, while it might have been narrowed in the respect referred to by the counsel for the respondent, was not erroneous, because it set forth the entire hypothesis upon which the statute had provided for the immunity of the company.

Judgment and order denying a new trial reversed and cause remanded.

Estate of WILLIAM McCAUSLAND, Deceased, Appellant, v. Application of ANNIE F. McCAUSLAND, Respondent.*

No. 4989; February 7, 1876.

Marriage—Contract in the Present.—The Findings of the Court below as to a contract of marriage in the present are not to be disturbed when made up on evidence substantially conflicting.

APPEAL from Probate Court, Santa Clara County.

Campbell, Fox & Campbell for appellant; J. E. McElrath for respondent.

*For subsequent opinion, see Estate of McCausland, 52 Cal. 568.

By the COURT.—There was evidence tending to prove both a contract of marriage in the present and also a contract per verba de futuro cum copula.

This must be decisive of the case, for, assuming a substantial conflict in the evidence, we cannot disturb the findings of the court below.

Judgment and order appealed from affirmed.

STANISLAUS SOMO, Appellant, v. JAMES D. OLIVER, Respondent.*

No. 4911; April 3, 1876.

State Land—Contests.—The District Court has No Jurisdiction of a contest set on foot in the state land office by a party seeking to purchase lands of the state, as against another party to whom a patent for the lands has been issued by the state before the filing of his application by the contestant.

APPEAL from Seventh Judicial District, Mendocino County.

Benjamin Morgan for appellant; R. McGarvey for respondent.

RHODES, J.—It appears from the record that a patent was issued by the state to the defendant for the lands in controversy on the second day of April, 1873; that on the seventh day of April, 1873, a certificate of survey in the name of plaintiff was filed in the office of the surveyor general; that on the same day the plaintiff filed his protest against the issuing of a patent to the defendant for the portion of the lands embraced in the plaintiff's survey; and that upon the demand of the plaintiff, the contest was referred to the district court for determination. It is provided by section 3414 of the Political Code that "when a contest arises concerning the approval of a survey or location, before the surveyor

*For subsequent opinion, see Somo v. Oliver, 52 Cal. 378.

general, or concerning a certificate of purchase or other evidence of title, before the register," the officer before whom the contest is made may in certain cases hear and determine the same, and in other cases he must certify the contest to the proper district court for determination.

The question which we regard as the vital one in the case is, whether the district court has jurisdiction of a contest set on foot in the state land office by a party seeking to purchase lands of the state, as against another party to whom a patent for the lands had been issued by the state, before the application of the contestant was filed. We are of the opinion that the district court has no jurisdiction of such a contest —that a contest of that character does not come within the meaning of section 3414, above cited. The statute does not, in our opinion, contemplate that a patent may be attacked in that mode. The purpose of the contest provided for by the code is not to determine whether the title has rightfully passed from the state, but whether one of the parties has, under the law, the right to purchase the lands from the state.

This question has not been discussed by counsel, but we are so well satisfied of the correctness of the conclusion above announced, that we place our decision of the case on that ground.

Cause remanded, with directions to dismiss the action.

We concur: Niles, J.; Crockett, J.; McKinstry, J.; Wallace, C. J.

PEOPLE, Respondent, v. GEORGE HAGER, Appellant.*

No. 4858; July 17, 1876.

Taxation—Purchasers of Land from State.—The act providing for the management and sale of lands belonging to the state requires that holders of such lands by purchase from the state shall be proceeded against for delinquent taxes in the same manner as provided by law for the collection of state and county taxes, which latter proceedings are brought in the name of the people.

Taxation—Several Parcels—Enforcement of Tax.—In a case where, although there are several parcels of land of one owner sev-

*For subsequent opinion, see People v. Hagar, 52 Cal. 171.

erally assessed, there has been but one assessment and the cause of action is the failure to pay this, the assessment may be enforced in one action.

Jurisdiction—Conclusiveness of Decision as to.—If an inferior court of limited jurisdiction has passed upon the necessary jurisdictional facts and decided them to be sufficiently proved, the parties and their privies are estopped to litigate them again in a collateral action.

Swamp Land Reclamation—Conclusiveness of Proceedings.—When it affirmatively appears that a board of supervisors in the course of proceedings resulting in an assessment found, in the manner required by law, that the statements in a petition for the organization of a reclamation district were true and that no land was improperly included in the district, such statements cannot again be litigated in a collateral action by one who was a party to the reclamation proceedings.

APPEAL from Tenth Judicial District, Colusa County.

A. L. Hart, district attorney, Wm. Blanding and S. W. Sanderson for respondent; W. C. Belcher for appellant.

CROCKETT, J.—The action is to enforce the payment of an assessment levied on lands of the defendant Hager within swamp land district No. 108. A demurrer to the complaint was overruled by the court and we think correctly. The swamp land district was organized under the act of March 28, 1868, entitled "An act to provide for the management and sale of the lands belonging to the state" (Stats. 1867–68, p. 507), and section 35 of the act provides that if an assessment be delinquent, "the district attorney shall proceed at once against all delinquents in the same manner as is provided by law for the collection of state and county taxes," since the method provided by law for the collection of delinquent taxes on real estate was an action in the name of the people against the person delinquent, and all owners and claimants known and unknown, and against the real estate. It is clear, therefore, that the action was properly brought in the name of the people.

It is claimed, however, that there was a misjoinder of causes of action in this, that there were several distinct parcels of land of the defendant Hager which were separately assessed,

and the action is to enforce the lien on each tract severally. It is contended that the causes of action are several and distinct, and cannot be joined under section 64 of the Practice Act, in force when the action was commenced.

In Dyer v. Barstow, 50 Cal. 652 (October term, 1875), we held that under the statute regulating street assessments in San Francisco, two separate and distinct causes of action founded on separate assessments could not be united in one complaint. But in the present case, though there were several parcels of land of the same owner which were severally assessed, there was but one assessment, and the cause of action is the failure to pay it. The assessment is a unit, constituting but one transaction, and is strictly analogous in this respect to a levy of state and county taxes upon different parcels of land of the same owner. In both cases there is a lien on each separate parcel for the burden imposed upon it, to be enforced by a proceeding in equity. But it has never been doubted, so far as we are aware, that under our revenue system a tax levied at the same time upon several, separate parcels of land of the same owner may be enforced in one action. This, we think, has been the uniform practice, and it would lead to a great and useless multiplicity of actions if it were otherwise. The same rule is applicable to assessments of this character.

For the purpose of showing that the assessment was duly and regularly levied, the complaint recites the proceedings had before the board of supervisors for the organization of the reclamation district and the subsequent proceedings culminating in the assessment. The complaint was not verified, but the answer was, as required by section 446 of the Code of Civil Procedure in actions brought by the state. Among other defenses, the answer contained, first, a general denial; second, a denial of certain facts necessarily adjudicated by the board of supervisors in the proceedings to organize the district and to levy the assessment; as, for example, that the land was swamp and overflowed, or that the petitioners held certificates of purchase for the requisite amount, or that the defendant's lands would be benefited by the improvement; and also an averment that there were a large number of land owners within the district who did not sign or assent to the by-laws, and that the defendant's title to his land was derived under a con-

firmed Mexican grant. On the motion of the plaintiff the court struck out the general denial and those portions of the answer already adverted to, and this ruling is relied upon as error.

It needs no authority to show that a general denial in a verified answer is nugatory and should be disregarded. The other clauses stricken out, with one or two exceptions hereafter noticed, were denials of facts not averred in the complaint and on which no issue was tendered to the defendant. One example on this point will suffice for the whole. The complaint avers that on a certain day a verified petition was presented to the board of supervisors by certain persons, setting forth that they desired to reclaim a certain body of swamp and overflowed land, described by government subdivisions, stating the number of acres of which the petitioners held certificates of purchase, patents, and other evidences of title for more than one-half, and setting forth, further, the whole quantity of land sold in said district, the number of acres in each tract sold, with the names of the owners so far as known, and that the land was susceptible of one mode of reclamation, and praying for an order of publication, etc. The only fact averred in this portion of the complaint was, that on the day specified a petition such as is above described was presented to the board of supervisors. But there is no averment that the facts stated in the petition were true, nor was it necessary, in our view of the case, that there should have been. The answer, however, denies that the land was swamp and overflowed, or that the petitioners held certificates of purchase, patents or other evidences of title for one-half of it or more. These facts were not averred, but only that the petition presented to the board so stated. The same observation applies to other denials of facts recited in the proceedings before the board, and which must necessarily have been adjudicated in the course of the proceeding resulting in the assessment. These recitals were necessary for the purpose of showing that the board acquired jurisdiction to organize the reclamation district and subsequently to order the assessment, and it would have been competent for the defendant to deny that any such proceedings occurred, or to question their sufficiency in law to confer jurisdiction on the board.

But it is well settled that if an inferior court of limited jurisdiction has passed upon the necessary jurisdictional facts and decided them to be sufficiently proved, the parties and their privies are estopped to litigate them again in a collateral action: Bigelow on Estoppel, 142 et seq., and cases there cited. This author says: "The rule that the jurisdiction of inferior courts is open to inquiry is subject to the following important qualification: If the inferior court has passed upon the jurisdictional facts and found them sufficient, the parties and their privies are estopped in collateral actions to litigate them again"; and in support of the rule numerous authorities are cited. In his work on Judgments (section 523), Mr. Freeman states the rule in these words: "Whenever the jurisdiction of a court not of record depends on a fact which the court is required to ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is conclusive and not subject to any collateral attack"; and many adjudicated cases are referred to in support of the rule.

In this case it affirmatively appears that the board of supervisors found in the manner required by the statute that the statements contained in the petition for the organization of the district were correct, and that no land was improperly included in the district. Under the rule just stated the facts set forth in the petition cannot again be litigated in a collateral action by one who was a party to that proceeding, as this defendant was, and it results that such portions of the answer as attempted to call in question the truth of the facts alleged in the petition were properly stricken out.

This view of the law disposes of most of the clauses which were stricken out. But there are several which do not come within this category. The answer avers that Hager's land within the district is held by him under a valid Mexican grant, duly confirmed and patented. This was no defense to the action and was properly stricken out: Hager v. Supervisors, 47 Cal. 222. Another averment is that more than forty persons owning land in the district, exceeding twenty-five thousand acres, neither signed the petition or by-laws nor were asked to sign either. This tendered an immaterial issue and was properly stricken out. The complaint avers that the petition to the board was signed by the Sacramento Valley

Reclamation Company, "a corporation duly formed and existing under the laws of the state of California." The answer denies that the company was a corporation "authorized by or legally formed under the laws of the state," and avers that on the day when the petition was presented, or at any time since, the company did not and could not lawfully hold or own any of the lands described in the petition, or any lands in the state, and was not and is not a corporation duly incorporated or possessing any corporate power or authority under the laws of the state.

This clause was stricken out; but in the progress of the trial the plaintiff put in evidence the certificate of incorporation, and contends that if the court erred in striking out this clause of the answer, no damage accrued to the defendant, inasmuch as he had the benefit of his denial and the plaintiff overcame it by proof. But this clause of the answer having been stricken out, there was no longer any issue in the case to which the proof was applicable, and if the fact was found by the court in favor of the plaintiff, the finding must be disregarded, as the rule is well settled that all findings outside the issues are nugatory. The parties are not required to adduce proofs as to facts not in issue. Nor can there be any doubt that this clause of the answer, if proved, presented a valid defense to the action, and that the court erred in striking it out.

One of the averments in the complaint is that the Sacramento Valley Reclamation Company was "a corporation duly formed and existing under the laws of the state of California." This was explicitly denied in the answer, which further averred "that the said Sacramento Valley Reclamation Company did not and could not lawfully hold or own on said seventeenth day of August, 1870, or at any time since, any of the lands particularly described in the complaint or in the petition in said complaint mentioned." In the petition presented to the board of supervisors for the organization of the district, it was not alleged that this company was a corporation, and there can be no presumption that the board decided that it was.

For aught that appeared on the face of the petition or in the proceedings of the board, the Sacramento Valley Reclamation Company may have been a joint stock company or a com-

mercial partnership. The fact that it was a corporation, and as such the owner of a large portion of the lands included in the schedule annexed to a petition, was for the first time averred in the complaint, and was a material and issuable fact, which the defendant had a right to controvert. But the court below denied him the opportunity to do it, by striking out that portion of the answer. This was error.

Judgment and order reversed and cause remanded for a new trial.

We concur: Rhodes, J.; Niles, J.

PEOPLE, Respondent, v. GEORGE HAGER, Appellant.

No. 4858; July 17, 1876.

APPEAL from Tenth Judicial District, Colusa County.

A. L. Hart, district attorney, Wm. Blanding and S. W. Sanderson for respondent; W. C. Belcher for appellant.

CROCKETT, J.—This is an appeal by the plaintiff from an order made and entered in the court below, on the motion of the defendant, to retax the costs, striking out from the cost bill the item of the fees of the district attorney. There was also an appeal in the same case by the defendants from the judgment and from the order denying their motion for a new trial. These appeals were argued and submitted together, and at the present term we have reversed the judgment and remanded the cause for a new trial. This disposition of the case is necessarily decisive of the present appeal. The judgment being reversed, there can no longer be any pending controversy as to the taxation of costs.

Appeal dismissed.

We concur: Rhodes, J.; Niles, J.

HEINLEN, Respondent, v. MARTIN, Appellant.*

No. 4150; July 17, 1876.

Ejectment.—Actions Other Than Those Technically of Ejectment can be brought for the recovery of the possession of real estate.

Pleading—Surplusage.—Words in a Complaint Putting a False Construction upon a power of attorney copied at length in the same complaint are to be treated as surplusage.

Evidence—Testimony at Former Trial.—When a witness is disabled by sickness from attending a trial, his deposition, taken previously in another case after due notice to the opposing side, may, if otherwise competent and material, be read at such trial, if in the other case, even though it was entitled as between other parties, the same parties were litigants against each other and the same subject matter was involved.

Power of Attorney—Proof of Original in Foreign Record.—When an original power of attorney is a foreign record in a foreign country, an exemplified or sworn copy is admissible in evidence.

Power of Attorney—Execution and Record in Foreign Country. When under the laws of a foreign country the constituting of one person to be the attorney in fact of another is effected, not by the execution of a paper and the manual transfer of it by the first person, but rather by a declaration by him to a notary in words which the notary then writes in his presence into a book of public record, he subscribing the writing, a copy of which is thereupon given the attorney thus made, any objection that there is indicated here no delivery from the donor to the donee is met by the fact that the document becomes by the executing it beyond its signer's control, which fact is to be taken with that of the delivery to the notary and the plain intention implied from all the circumstances that the parties regarded the transaction as complete.

Power of Attorney by Married Woman to Sell Land.—A power of attorney to sign, seal and deliver deeds of real estate in California owned by a married woman is without legal effect if not executed and acknowledged by her according to the laws of the state prevailing at the time of its date.

APPEAL from Third Judicial District, Santa Clara County.

T. E. Spencer and Wm. Matthews for respondent; Houghton & Reynolds for appellant.

*For subsequent opinion, see 53 Cal. 321; 59 Cal. 181.

CROCKETT, J.—It is urged by the defendants that the action is ejectment and that they were entitled to a trial by jury. But the point is not well taken. The plaintiff deraigns his title through the power of attorney to Camarena, a copy of which is annexed to and made a part of the complaint. This instrument was not under seal, and was therefore insufficient to authorize a conveyance of the legal title. If the pleader in the complaint put a false construction on the power of attorney, this will be rejected as surplusage, as the error appears on the face of the instrument which forms a part of the complaint: Stoddard v. Treadwell, 26 Cal. 302. But taking the whole complaint together, we do not understand it as asserting that the legal title was in the plaintiff. On the contrary, its obvious purpose was to have the defendants declared to be trustees, holding the legal title for the use of the plaintiff, and to compel a conveyance, with a delivery of the possession and an accounting for the rents and profits. The cause of action stated in the complaint is one of purely equitable cognizance.

Nor did the court err in admitting in evidence the two depositions of Melone. The evidence was material and competent, and it was admitted that the witness was disabled by sickness from attending at the trial. His deposition entitled as having been taken in the case of Senter v. Bernal was taken in a proceeding to which the present plaintiff and defendants were contesting parties, and related to the same subject matter which is in controversy in this action. Both depositions were taken upon due notice to these defendants, and no objection is made to the manner of taking or authenticating them. We discover no ground on which they could have been properly excluded.

One of the points relied upon by the defendants is, that the power of attorney to Camarena did not authorize him to appoint a substitute in respect to the sale and conveyance of the land in controversy. But the point is not tenable. The power of substitution contained in the instrument is coextensive with the power conferred on the attorney himself.

The most important question in the case is that which relates to the execution, delivery and authentication of the power of attorney to Camarena and his substitution of Splivalo. Each of these instruments was executed in the repub-

lic of Mexico before a notary public, in the method which is usually observed in countries where the civil law prevails. The parties appeared before the notary and made a declaration of the specific powers which they intended to confer upon the attorney. The declaration was reduced to writing by the notary in a book kept by him as an official record for that purpose, and when completed was signed by the parties and attested by the notary and two witnesses. A copy or duplicate was then made by the notary, who attested in his official capacity. This official copy was delivered to the attorney, and it was this which was offered in evidence at the trial as an examined copy, proof having been adduced to show that it had been compared with the original in the official record and was correct. The execution of the original was also proved by one or more of the subscribing witnesses.

It is objected that the copy offered in evidence was inadmissible, because, first, it was secondary and not primary evidence; and, second, there was no delivery of the original. On the first point it will suffice to say that the copy was the best evidence which it was in the power of the plaintiff to produce. The original was a public record in a foreign country, and there can be no presumption that it would be permitted to be withdrawn for the purpose of being used as evidence in another country. A contrary presumption would be more reasonable, and more in accordance with international usages. Foreign records are invariably proved by properly exemplified or sworn copies. On the question of delivery, the proof was sufficient. The document was no longer within the power or under the control of the parties who executed it, and the delivery to the notary, with the intention necessarily implied from all the circumstances that the parties understood the transaction as completed, was, in legal effect, a delivery to the attorney.

But it appears on the face of the power of attorney that Josefa Ballardi Arguello de Camarena, one of the persons who executed it, was at the time a married woman and her husband did not unite in the instrument, nor was she examined separately and apart. Under our statutes then in force a married woman could not execute a valid power of attorney for the sale or conveyance of her separate real estate unless her husband united in the conveyance, and unless she was examined by the

officer separately and apart from her husband and on such examination admitted that she executed the same freely and voluntarily, without fear or compulsion or under influence of her husband, and that she does not wish to retract the execution of the same: Stats. 1862, p. 518; 1863, p. 165; 1850, p. 251. As to this married woman, the power of attorney was void and conferred no authority on Camarena or his substitute to convey her interest in the land.

It follows that the judgment of the court below is erroneous, in so far as it determines that the plaintiff acquired an equitable title to her interest or any portion of it, and must be modified in this particular. But we discover no other error in the record, and deem it unnecessary to notice the other points discussed by counsel.

Judgment and order affirmed except in the particular above stated, and as to that the judgment is reversed and the cause remanded, with an order to the court below to modify the judgment in accordance with this opinion.

We concur: Rhodes, J.; Niles, J.; McKinstry, J.

Wallace, C. J., being disqualified, did not sit in this cause.

E. P. FIGG, Respondent, v. SAMUEL HANDLEY, Appellant.*

No. 5036; July 17, 1876.

Public Lands—Issuance of Certificate of Purchase.—By neither state law, act of Congress, nor regulation of the land office is a "certificate of purchase" defined, nor is it prescribed by either in what cases, under what conditions or by what officer it shall issue; the method in this connection rests upon a custom that has become established.

Public Lands.—An Application to Purchase Public Land must be Filed with the register, and, if the aim is to purchase by private entry, the application must be in writing; to this that official appends his certificate that the tract is subject to such entry, and his specification of the price, after which it is by the applicant, when making payment, delivered to the receiver, who then gives duplicate receipts,

*For subsequent opinion, see Figg v. Handley, 52 Cal. 244.

one of which is returned to the register, who next transmits it to the commissioner of the general land office, after first issuing a certificate of purchase to the applicant; the other duplicate is retained by the applicant, to be surrendered on his receiving his patent thereafter.

Public Lands—Application and Patent.—In Applications to Purchase public lands under the pre-emption laws, the declaratory statement must be filed with the register, but the proof must be made to the satisfaction of both him and the receiver, the latter then issuing duplicate receipts, one of which is retained by the applicant and the other delivered to the register, as in the case of a private entry. After this, however, the proofs and the decision thereon of the two officials are, with the duplicate receipt held by the register, forwarded to the commissioner of the general land office, and he, on approving the decision mentioned, issues the patent to the applicant on surrender of the duplicate retained by him.

Public Lands—Certificate of Purchase—Receiver's Certificate.—In the case of land taken under the pre-emption laws the receiver's duplicate must be held to be a "certificate of purchase, and is in all respects as satisfactory evidence that the proofs were sufficient, and that the applicant has purchased and paid for the land, as though it had been made by the register, and comes fully within the spirit of the statute declaring that certificates of purchase shall be prima facie evidence of title.

APPEAL from Fifth Judicial District, San Joaquin County.

John B. Hall for respondent; Byers & Elliott for appellant.

CROCKETT, J.—The action is ejectment for a portion of the sixteenth section; and so far as the case shows, the defendant is a mere intruder without title or color of right. The plaintiff relies, 1st, upon a duplicate receipt issued by the receiver of the proper local United States land office, to one Ayres, certifying that he had made full payment under the Pre-emption Act of 1841, for the land in controversy; which receipt was assigned to the plaintiff before the commencement of the action; 2d, upon certificates of purchase issued in due form by the state of California to Cox and Ayres, for the same land, and which certificates were also duly assigned to the plaintiff.

The plaintiff contends that the receiver's duplicate receipt is a "certificate of purchase" in the sense of section 1925 of

the Code of Civil Procedure, and under that section is prima facie evidence of title, except as against one in the adverse possession at the date of the certificate; and it is not pretended that the defendant comes within that category. 3d, that if the receipt is not to be deemed a certificate of purchase, the plaintiff is entitled to recover under the certificates of purchase issued by the state; which, under section 1925, are prima facie evidence of title.

In considering the first point, some embarrassment arises from the fact that neither our statute, nor any act of Congress, nor any regulation of the land department, so far as we are aware, defines a "certificate of purchase" or prescribes in what cases, under what conditions, or by what officers it shall be issued. If any such statute or regulation exists, it has not been called to our attention. A practice, however, appears to have grown up in the local land offices of the United States, in disposing of certain classes of the public land, to which the term "certificate of purchase" doubtless owes its origin. The register being the proper custodian of the official plats, applications to purchase are filed with him. If the application be to purchase by private entry a tract subject to sale in that method, the application is made in writing, to which the register appends his certificate that the tract is subject to private entry, and specifying the price. The applicant then takes the application, with the register's certificate annexed, to the receiver, to whom he makes payment, and from whom he receives duplicate receipts, one of which he retains, to be delivered up on receiving a patent, and returns the other with the application to the register, who thereupon issues a certificate of purchase, which he afterward transmits to the commissioner of the general land office, accompanied by the duplicate receipt in his possession. Thereupon the patent issues to the applicant, on his surrendering the duplicate receipt retained by him: 1 Lester's Land Laws, p. 311. But in applications to purchase under the pre-emption laws, a somewhat different practice prevails. The declaratory statement must, of course, be filed with the register; but under section 12 of the act of September 4, 1841, the proof must be made to the satisfaction of both the register and receiver. In the very nature of the proceeding, the receiver is as fully informed as the register as to their joint decision in respect to

the sufficiency of the proofs. If the proofs are decided to be satisfactory, payment is made to the receiver, who issues duplicate receipts, one of which is retained by the applicant and the other delivered to the register, as in the case of a private entry; after which the proofs and the decision of the register and receiver, together with the duplicate receipt delivered to the former, are forwarded to the commissioner of the general land office. If he approves the decision, a patent issues to the applicant, on the surrender of the duplicate receipt retained by him.

This we understand to be the usual course of proceeding in this class of entries; in view of which we are of opinion that the receiver's duplicate receipt must be held to be a "certificate of purchase," in the sense of section 1925 of the Code of Civil Procedure. In legal effect, it is a certificate by one of the officers who heard and decided upon the sufficiency of the proofs that the proofs were satisfactory, and that the applicant has purchased and paid for the land. It is in all respects as satisfactory evidence of these facts as though it had been made by the register, and comes fully within the spirit of the statute declaring that certificates of purchase shall be prima facie evidence of title.

It may be that a formal certificate is usually made by the register in such cases, to the effect that the proofs are satisfactory, and that the applicant is entitled to a patent; and that this is forwarded by the register to the general land office, as a matter of routine in the course of the proceeding to obtain the patent. But we have no evidence that there is any practice by which this certificate is delivered to the applicant, or that there is delivered to him any other muniment of title than the receiver's duplicate receipt. In this case the duplicate receipt is dated November 7, 1873, and the case does not show that any certificate was issued by the register; and we find from a published decision of the Secretary of the Interior, made on the 26th of April last, in adjudicating the rights of these parties, that he refers to the certificate as dated November 7, 1873—the date of the duplicate receipt in evidence here. But whatever may be the practice of the land department in respect to these certificates, we hold that in the case of a pre-emption claimant the duplicate receipt of the receiver certifying that the applicant has made full payment

for the land under the pre-emption laws is "a certificate of purchase" within the purview of section 1925 of the Code of Civil Procedure.

This view of the case renders it unnecessary to notice the other points discussed by counsel.

Judgment and order affirmed.

We concur: Rhodes, J.; Niles, J.; McKinstry, J.

F. HOKE, Appellant, v. W. H. PERDUE et al., Respondents.

No. 4707; August 14, 1876.

Reclamation Works—Injury Without Compensation.—In projects for local improvements, such as reclamation works, the fact that the land of some one taxpayer will be injured rather than benefited does not make out a case of taking for the public use without a just compensation in violation of the constitution.

APPEAL from Tenth Judicial District, Sutter County.

J. L. Wilbur and Creed Haymond for appellant; J. S. Belcher and J. R. Ray for respondents.

CROCKETT, J.—Except in one particular this case is not distinguishable from Dean v. Davis, No. 4706 [51 Cal. 406], decided at the present term, and the judgment must be affirmed on the authority of that case, unless there be something in the particular referred to which shall lead to a different result.

In addition to the causes of action relied upon in Dean v. Davis [51 Cal. 406], the complaint in the present action alleges that if the reclamation works shall be reconstructed, they will have the effect, not to benefit the plaintiff's land, but, on the contrary, greatly and permanently to depreciate its value. It is claimed, therefore, that this will constitute a "taking" of the land for public use without a just compensation, in violation of the constitution. But in schemes for local improvements of this character, where the expenses

are to be defrayed by means of a tax levied upon the property within the district supposed to be benefited, the payment of the tax cannot be resisted, on the ground that a particular parcel of land within the district will not be benefited, but, on the contrary, may or will be injuriously affected by the proposed improvement. In People v. Whyler, 41 Cal. 351, we had occasion to consider whether the act of March 25, 1868 (Stats. 1867–68, p. 316), under which this "levee district" was organized, imposed a tax upon the property within the district, or provided for an assessment on the property to be benefited, for the purpose of raising a fund to defray the expenses of the work, and our conclusion was that it is a tax and not an assessment. The plaintiff resists the payment of this tax, and seeks to enjoin the further prosecution of the work, on the ground that his land will not be benefited, but, on the contrary, will be permanently injured by the proposed improvement. It is clear, however, that a tax imposed by the legislature cannot be resisted on the ground that the purposes to which it is to be applied will not benefit the taxpayer, and may affect him injuriously. That is a question for the legislature and not for the courts to decide. Nor can a local improvement be defeated, on the ground that a particular piece of property may be injuriously affected by it. In grading the streets of a city, a particular lot may be left so far above or below the grade as greatly to impair its value; but this affords no reason for resisting the improvement, nor can the owner recover damages from the corporation: Dillon on Mun. Corp., secs. 543, 782, 783, and cases cited. "Every great public improvement must, almost of necessity, more or less affect individual convenience and property; and when the injury sustained is remote and consequential, it is damnum absque injuria, and is to be borne as a part of the price to be paid for the advantages of the social condition. This is founded upon the principle that the general good is to prevail over partial individual inconvenience": Lansing v. Smith, 8 Cow. (N. Y.) 149.

In the present case the anticipated injury to the plaintiff's land is speculative, remote and consequential. He thinks the proposed dam and levee will not be sufficient to withstand the periodical freshets; but that is only a matter of opinion, and the statute confides to the board of supervisors and their engi-

neer the duty of constructing proper works to protect the land from inundation. It cannot be assumed in advance that they will err in their judgment as to the sufficiency of the proposed works, or that they will perform their duty negligently.

Moreover, the law having confided to them the exercise of their judgment and discretion in the premises, it is not for the courts to interfere, unless it clearly appears that the proposed improvements will necessarily result in damaging the plaintiff's land to such an extent and in such manner as to constitute a "taking" in the sense of the constitution.

We think the complaint does not state such a case and contains no ground for equitable relief.

Judgment affirmed.

We concur: Rhodes, J.; Niles, J.

MATHEW KELLER, Respondent, v. CARRIE S. LEWIS et al., Appellants.*

No. 5191; November 2, 1876.

Cancellation of Instruments.—The Doctrine of Courts of Equity with respect to setting aside deeds, securities and agreements is referable to the jurisdiction they exercise in favor of a party quia timet.

Cancellation of Instrument Illegal on Its Face.—A court of equity will not direct to be delivered up or canceled an instrument illegal on its face, since there can be no danger that lapse of time will deprive of defense a party applying for the cancellation.

Cancellation of Instrument.—If an Agreement Having Reference to Land is valid on its face and might be made the foundation of and important evidence in an action, it operates as a cloud on the title, and the owner of the land has a right to have it set aside either as such cloud or as a probable subject of future litigation.

Cancellation of Instrument.—If an Instrument Ought not to be Used or enforced, it is against conscience for the party holding it to retain it, since his retaining it can be only for some sinister purpose.

Cancellation of Instrument.—One Who Holds an Instrument That Menaces the Title of another's land, and whose continuing so

*For subsequent opinion, see Keller v. Lewis, 53 Cal. 113.

to hold can serve no just purpose of his own, cannot justify the retention of it by disallowing any intent to rely upon it and by claiming it was obtained by the other's fraud.

Cancellation of Abandoned Contract to Convey Land.—If one holding a contract looking to the sale of land to him, which contract he has failed to live up to and has voluntarily abandoned, puts the land owner to the necessity of suing for a cancellation, the court has jurisdiction to bar him, by the terms of its decree, from asserting any claim to money paid by him on the contract.

APPEAL from Seventeenth Judicial District, Los Angeles County.

Bronson & Eastman for respondent; Glassell, Chapman & Smith for appellants.

By the COURT.—Is the plaintiff entitled to a decree setting aside the agreement for the sale of the rancho "Tobango Malibu" made with defendant Carrie S. Lewis?

The complaint alleges failure to perform on the part of defendants and that they have abandoned the agreement. The answer admits the failure and contains no offer to perform, but alleges that the agreement is void, because defendant Carrie S. Lewis was induced to enter into by reason of false and fraudulent representations of plaintiff. The district court found no fraud, and we think the finding is sustained by the evidence.

The doctrine of courts of equity with respect to setting aside deeds, securities and agreements is referable to the jurisdiction they exercise in favor of a party, quia timet. When, therefore, the illegality of an instrument appears on the face of it, a court of equity will not interfere to direct it to be delivered up or canceled; in such case there can be no danger that lapse of time will deprive a party applying for its cancellation of his full means of defense.

It has been said where the instrument sought to be set aside is a deed purporting to convey the legal title, it will be canceled, as a cloud on the title of complainant, if, in case an action of ejectment should be brought on the deed, the burden of proving its invalidity would be cast upon the party applying for its cancellation. But this, in respect to deeds, is but

the same thing as saying that if the deed is regular on its face and prima facie sufficient to convey the title, the equitable jurisdiction will be maintained. The important question is: Is the instrument valid on its face, and has the party seeking to annul it reasonable ground of fear that, with or without other evidence, it may be made the foundation of unjust and vexatious litigation against him?

By the terms of the agreement before us time is not of the essence of the contract. It is possible if the party named as purchaser should file a bill for specific performance, her prima facie case would not be made out, in the view of the court, without some evidence excusing her delay. But the agreement on its face is valid, and might be made the foundation of an action, and would certainly constitute the most material and important portion of the evidence therein. While the agreement remains outstanding, it operates as a cloud which must seriously embarrass the disposition of plaintiff's estate; but whether regarded as a cloud on his title or as a probable subject of future litigation, plaintiff has a right to have it set aside.

"If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose, to the injury of a third person. If it is a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud over the title. If it is a mere written agreement, solemn or otherwise, still while it exists, it is always liable to be applied to improper purposes, and it may be vexatiously litigated at a distance of time when the proper evidence to repel the claim may have been lost or obscured, or when the other party may be disabled from contesting its validity with as much ability and force as he can contest it at the present moment": 2 Story's Equity, 699.

The fact that defendants in their answer disavow an intent to rely on the agreement, but charge it to have been obtained by fraud, does not deprive plaintiff of his right to a decree. The contract was retained by defendants up to the commencement of the suit, and plaintiff may well have feared its future

use, and had a right to demand that it be delivered up or canceled.

Nor is the decree erroneous in so far as it adjudges that defendants be barred from asserting any claim to the money paid upon the contract. By their answer in this case the defendants put in issue their alleged right to the money by averring the fraud and consequent invalidity of the contract. Upon that issue the court below found against them, and so finding, and having acquired jurisdiction of the general subject matter, properly proceeded to determine the rights of the parties in respect to the money.

Judgment and order affirmed.

CHARLES A. THOMPSON, Respondent, v. DIXEY W. THOMPSON, Appellant.*

No. 5005; November 2, 1876.

Pleading.—A Cross-complaint is Unknown to the Code of Civil Procedure, and new matter found in the answer is denied by force of the statute.

Pleading—New Matter Alleged in Answer—Proof.—It is incumbent on a defendant to prove at the trial the new matter set up in his answer, and in default of his doing so the allegations of new matter go for nothing.

Deed.—A Description in a Conveyance is not Too Vague if it gives the contents of the land and its local situation and designates it as lot No. 62 on the official map of the outside lands of the town of Santa Barbara.

Municipal Corporations.—Pueblo Lands Confirmed and Patented to a City by the United States, as successor to the pueblo, must be assumed to be held by the city in trust, and the power to alienate them must be conferred, if at all, by the legislature of the state.

Municipal Corporations—Sale of Vacant Lands.—The Original Ordinance of the city of Santa Barbara, of August 8, 1864, and the subsequent amendments thereto, limiting the authority of the president and board of trustees to the sale of vacant lands, did not extend to lands continuously occupied.

APPEAL from First Judicial District, Santa Barbara County.

*For subsequent opinion, see Thompson v. Thompson, 52 Cal. 154.

Eugene Fawcett for respondent; Charles E. Huse for appellant.

By the COURT.—1. The pleading upon the part of the defendant did not amount to a cross-complaint, for this is unknown to the Code of Civil Procedure (sections 420, 462). There was, therefore, no necessity for a reply upon the part of the plaintiff, the new matter found in the answer being denied by force of the statute. In this view it was incumbent on the defendant at the trial to support his answer by proof, in so far as the answer set up new matter, and having failed in this, the allegations of new matter found in the answer go for nothing.

2. It was not well objected that the plaintiff's exhibit No. 4 (being the conveyance from Francisco de la Guerra to C. A. Thompson) was vague in its description or did not identify any land. It described the land as a lot containing fifty and fifty-two one-hundredths acres situate in the town and county of Santa Barbara, in the state of California, and being the same lot designated as lot No. 62 of the lots marked on the official map (made by Norway, surveyor) of the outside lands of the town of Santa Barbara.

3. The premises in controversy are part of the pueblo lands pertaining formerly to the pueblo of Santa Barbara and subsequently confirmed and patented to the city of Santa Barbara by the government of the United States, as successor to the pueblo—the fact that such a patent has been issued is stipulated, but the trusts, if any, inserted in the patent are not disclosed by the record. It must be assumed, therefore, that the lands are held by the city under the trusts attaching to them as pueblo lands, and the power to alienate them must be conferred, if at all, by the legislature of the state. No such legislative permission is shown; the only legislation called to our attention in this respect is the act passed April 2, 1870, ratifying and confirming grants and sales made "in conformity to ordinances . . . . in force at the time the grants or sales aforementioned were made." But the grant to Espinosa made in the year 1870, through which the plaintiff claims title, was not one made in conformity to any ordinance of the city gov-

ernment of the city of Santa Barbara. The original ordinance of August 8, 1864, and the amendments thereto, respectively passed November 4, 1865, and February 15, 1868, limited the authority of the president and board of trustees in this respect to the sale of such lands as were "vacant lands." But the lands in controversy were not "vacant lands" in 1870; the uncontradicted evidence shows that from 1860 to 1875, when the cause was tried, these lands had been continuously occupied by the defendant, and the conveyance to Espinosa was, therefore, not aided by the act referred to.

Judgment and order denying a new trial reversed and cause remanded.

ALEXANDER WEED, Appellant, v. GEORGE F. MAYNARD, Auditor, Respondent.*

No. 5401; December 12, 1876.

Municipal Corporations—Street Cleaning—Statute Regulating.—The power of the board of supervisors to cleanse the streets of San Francisco is subject to legislative control, both as to the extent of the work to be done and the mode in which the power is to be exercised.

Municipal Corporations—Street Cleaning.—The Principal Purpose of the Act of April 3, 1876, looking to the regulation of street cleaning in San Francisco, was to limit the authority of the board of supervisors in respect of both their power to regulate and the mode of its exercise, and the scope of the act in this respect is not to be defeated by mere reference to its title, "An act to confer additional powers upon the board of supervisors of the city and county of San Francisco."

Municipal Corporations—Street Cleaning—Statute Regulating. An act of the legislature limiting the powers of a board of supervisors in respect of street cleaning does not impair the obligation of a contract already made with a private person by such board if the contract is by its express terms to continue "during the pleasure of the board."

Municipal Corporations—Contract to Clean Streets.—"The Pleasure of the Board," as expressed in a contract between a board of supervisors of a city and a private person for the cleansing of streets, during which "pleasure" only the contract was to continue, would be determined ipso facto by the enactment of a law limiting the powers of the board in that connection.

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*For subsequent opinion, see Weed v. Maynard, 52 Cal. 459.

APPEAL from Nineteenth Judicial District, San Francisco County.

McAllister & Bergin, C. H. Parker and I. P. Hoge for appellant; W. C. Burnett for respondent.

By the COURT.—The power of the board of supervisors to cleanse the streets of the city of San Francisco is subject to legislative control, both as to the extent of the work to be done and the mode in which the power is to be exercised.

Assuming in favor of the appellant that no legislative restraint upon either the power or the mode had been imposed prior to the passage of the act of April 3, 1876 (page 795), it is obvious that the purpose of the act was to regulate both the power and the mode. Theretofore the extent of work to be done and the agency through which it was to be accomplished were committed entirely to the judgment of the board. But in the act referred to it is provided that the streets of the city are to be kept clean "in the following manner": The force to be employed in the work (except so far as it may be recruited from the House of Correction) is not to exceed twenty horses and carts with drivers, and twenty-five additional men as scrapers and sweepers, from the 1st of October to the 1st of April in each year, and for balance of the year fifteen horses and carts with drivers, and twenty additional men as scrapers and sweepers. By the second section of the act the work is to be superintended by two competent persons appointed by the board, at a salary not to exceed one hundred dollars per month to each. These superintendents are to report daily at the office of the superintendent of public streets "the names of all men, and men and teams employed the previous day and where employed," and also the license number of the carts employed in the work. The third and fourth sections of the act provide for the appointment of a superintendent of the work of cleansing the public sewers, who is to make like daily report to the superintendent of public streets; three horses and carts and thirteen men (with such re-enforcement from the House of Correction as may be) being the whole force to be employed in the business.

As observed already, one of the purposes—in fact, the principal purpose—of the act was to limit the authority of the board in the respect indicated, and we know no rule or statutory construction by which the clear scope of that act in this respect is to be defeated by mere reference to its title, "An act to confer additional powers upon the board of supervisors of the city and county of San Francisco." The title thus prefixed apparently had especial reference to the sixth and last section of the act, by which section the board was "invested with full power and authority to cause the persons sentenced or committed to the House of Correction to be employed in cleaning the public streets, highways and sewers of the city and county of San Francisco."

2. Nor do we think that the act is objectionable as impairing the obligation of the contract alleged to exist between the city and county of San Francisco upon the one part and George T. Bromley & Co. upon the other part. The facts are that these parties, in October, 1873, entered into a written contract for the cleaning by Bromley & Co. of certain public streets in the city, the contract to continue in force for the period of one year from the 20th of September preceding, in default of a notice of one month upon the part of the city, and which she reserved the right to give, terminating the contract at an earlier period of time. By the terms of the contract the streets of the city were classified, and for cleaning eighteen miles of certain streets Bromley & Co. were to receive one hundred and sixty dollars per mile per month; upon twenty-eight miles of other streets, eighty dollars per mile per month, and upon twelve and a half miles of "subdivision streets," forty dollars per mile per month.

This contract was fully executed by both parties and expired by its own limitation on the 20th of September, 1874. Upon its expiration the board of supervisors directed the committee on public streets to contract with Bromley & Co. "for cleaning the public streets on the same terms and conditions of the old contract, during the pleasure of the board." Pursuant to this resolution, and in a few days after its passage, the committee entered into a verbal contract with Bromley & Co., similar in all respects to the one just then expired, except that, as directed by the resolution, it was to continue "during the pleasure of the board." In June, 1876, the verbal contract

being still on foot, the board passed a resolution directing that it be reduced to writing as of its date, signed by the committee on health and police of the board, and placed on file in the office of the clerk of the board, which was done accordingly. In this condition of things the act of April 3, 1876, already referred to, was passed and went into immediate effect. The board has not, for itself, at any time before or since the passage of the act, given notice of its desire to terminate the contract.

It is claimed upon the part of the appellant that he is entitled to insist upon the contract, and to be paid according to its stipulations, until the required notice shall have been given by the board. But we are of opinion that, upon the taking effect of the act in question, which was immediately upon its approval by the governor, the pleasure of the board in the respect referred to in the contract necessarily ceased and determined.

As against the positive provisions of the statute to the contrary, the board could exercise no pleasure to continue the cleaning of the streets through agencies forbidden by positive law. Their pleasure must, in such a case, conform to their duty, and that was thereafter to exercise their authority to cleanse the streets and sewers in the manner prescribed by the act, and not otherwise.

It results from these views, and irrespectively of other points made by the respondent, that the judgment must be affirmed, and it is so ordered.

Mr. Justice McKinstry, who did not hear the argument, took no part in the decision.

CHARLES M. HITCHCOCK, Respondent, v. JEREMIAH CLARKE, Appellant.

No. 4810; December 17, 1876.

Mortgage—Effect of Foreclosure on Title.—A decree in a mortgage foreclosure case precluding a person from asserting any right acquired from the mortgagors after the execution of the mortgage would not devest him of any rights held paramount to the title of the mortgagor.

Cotenants—Acquisition of Adverse Title Through Mortgage.—Tenants in common of land subject to a mortgage have such a community of interest as precludes one from acquiring an adverse title as to the other through such mortgage or the payment of it without affording the co-owner an opportunity of paying his proportionate share and enjoying the benefit.

APPEAL from Fifteenth Judicial District, San Francisco County.

W. W. Cope for respondent; Williams & Thornton for appellant.

By the COURT.—The complaint in the action of Kane v. Castro et al. alleged "that the defendants Alexander Finance and Charles M. Hitchcock have, or claim to have, some interest in or claim upon said premises hereinbefore described, or some part thereof, as purchasers, mortgagees, judgment creditors or otherwise, which interest or claims are subsequent to and subject to the lien of the plaintiff's mortgages." The decree in that action would preclude the present plaintiff from asserting any right acquired from the mortgagor after the execution of the mortgage, but it did not devest him of any rights held paramount to the title of the mortgagor: Freeman on Judgments, sec. 303; Frost v. Koon, 30 N. Y. 444; Lewis v. Smith, 11 Barb. (N. Y.) 156; Bank of Orleans v. Flagg, 3 Barb. Ch. (N. Y.) 318. The land of the plaintiff was not subject to the lien of the second mortgage mentioned in the complaint in Kane v. Castro et al., and the plaintiff's right and estate were in no way affected by the decree in that action, in so far as it provided for the foreclosure of the second mortgage.

The plaintiff and defendant were tenants in common in possession of the land subject to the first of the two mortgages. They had, therefore, such a community of interest in a common title as precluded the defendant from acquiring an adverse title, without affording the plaintiff a reasonable opportunity, on payment of his proportionate share of the expense of its acquisition, to enjoy the benefit of such title: Rothwell v. Dewees, 2 Black (U. S.), 613, 17 L. Ed. 309. As this case is presented by the transcript, it neither appears, when the present action was brought, nor with any precision,

at what time the plaintiff offered to contribute his share of the first mortgage debt and of costs and expenses of foreclosure. It was his duty, within a reasonable time after he became apprised that defendant intended to claim to be the sole owner by virtue of the foreclosure and sheriff's deed, to make his election to claim the benefits and contribute to the expense of the foreclosure title.

As the case presents itself, we cannot, in opposition to the decision of the court below, say that he was guilty of such laches as should deprive him of his right to maintain this action.

Judgment and order affirmed.

Wallace, C. J., did not express an opinion.

Estate of WILLIAM McCAUSLAND, Deceased, Appellant, v. Application of ANNIE F. McCAUSLAND, Respondent.*

No. 4989; December 21, 1876.

Witness—Party to Claim Against Decedent.—Parties to an action or proceeding, or in whose behalf such is prosecuted, against an executor or administrator on a claim or demand against the estate in course of administration, are not competent as witnesses at the trial.

Witness.—A Claim by One Asserting Herself as the Widow for an Allowance out of the estate of a deceased person is "a claim or demand" against the estate, in the sense of section 1880 of the Code of Civil Procedure.

APPEAL from Probate Court, Santa Clara County.

Campbell, Fox & Campbell for appellant; J. E. McElrath for respondent.

By the COURT.—The respondent claiming to be the widow of Wm. McCausland, deceased, applied to the probate court for a family allowance out of the estate. The application was

*For subsequent opinion, see Estate of McCausland, 52 Cal. 568.

resisted by the heirs at law, on the sole ground that the applicant was not the widow of the deceased. This was the only issue in the cause. At the trial the applicant offered herself as a witness on her own behalf to prove her marriage with the deceased, and that she was his lawful wife at the time of his death. The heirs objected to her competency as a witness. But the objection was overruled and the heirs excepted. She then proceeded to testify to her marriage with McCausland, and that she was his lawful wife at the time of his death.

Section 1880 of the Code of Civil Procedure, as amended in 1874, provides that "parties to an action or proceeding, or in whose behalf an action or proceeding is prosecuted against an executor or an administrator, upon a claim or demand against the estate of the deceased," shall not be competent witnesses.

It is contended on behalf of the respondent that a claim for a family allowance by the widow out of the estate of a deceased person is not "a claim or demand" against the estate in the sense of the statute. But we think otherwise.

On the opposite theory, while a person claiming to be a creditor of the estate on a money demand, however inconsiderable, would not be competent to testify in his own behalf, a person claiming to be the widow of the deceased might establish her right to the whole or a large portion of the estate by her own testimony alone.

We think the case comes fully within the evil intended to be remedied by the statute, and the language of the section is sufficiently comprehensive to include it.

Judgment and order reversed and cause remanded for a new trial.

RHODES, J., Dissenting.—In my opinion a family allowance is not a "claim or demand," within the meaning of section 1880 of the Code of Civil Procedure, and I, therefore, dissent from the foregoing opinion and judgment.

CHARLES E. GREENE, Respondent, v. DANIEL MEYER and J. F. BAKER, Appellants.

No. 4879; January 27, 1877.

Trover—Proof of Right to Possession.—In an action of trover the plaintiff must prove himself to be entitled to the immediate possession of the goods alleged to have been converted.

APPEAL from Fourth Judicial District, San Francisco County.

This was an action of trover. E. E. Morgan's Sons were San Francisco commission and shipping merchants engaged in chartering ships and receiving on board vessels controlled by them wheat and other goods for delivery at European ports, sales there to be for the account of and at the risk of the owners of the goods, the latter agreeing with these shipping merchants on the rates to be charged. Baker was master of the ship "Pride of the Port," whereon the wheat, out of the shipping of which the case originated, was placed by the Morgans for transportation under their agreement with the plaintiff and his assignors to Cork, Ireland. Meyer was a banker in San Francisco. After their making the shipment referred to in the decision, the Morgans, being deeply in debt to Meyer already, increased the indebtedness largely and gave him the bill of lading as collateral. Meyer knew at the time what the character of the Morgans' business was and had every reason to know that the wheat was the property of them only in a representative capacity, also that they were insolvent. The suit was begun immediately after the making of the loan; the trial court gave judgment against Meyer, but not against Baker.

Delos Lake for respondent; Howe & Rosenbaum and G. F. & W. H. Sharp for appellants.

McKINSTRY, J.—At the trial it was admitted: "The plaintiff and his assignors delivered the wheat described in the complaint to Morgan's Sons, to be shipped by them to England for sale. Morgan's Sons placed the same on board

the 'Pride of the Port' for shipment in accordance with said agreement."

The wheat was shipped by Morgan's Sons, and the bill of lading ran to them.

The defendant Baker was in actual possession of the wheat, with the right to earn the freight thereon. Neither the plaintiff nor his assignors have had the right to the immediate possession of the wheat at any time since the same was shipped. In this class of actions the principle is of universal application that the plaintiff must prove himself to be entitled to the immediate possession of the goods alleged to have been converted.

The court below properly entered judgment in favor of one defendant, but should have rendered a like judgment in favor of the other.

Judgment and order reversed and cause remanded with an order to the court below to enter judgment in favor of the defendant Meyer.

I concur: Niles, J.

I dissent: Rhodes, J.

CROCKETT, J.—I concur. The action is trover against two defendants to recover the value of certain wheat of the plaintiff, alleged to have been converted by the defendants to their own use.

The court below finds that at the commencement of the action "the defendant Baker was in the lawful possession of said wheat, as master of said ship, for the purpose of transportation to Cork aforesaid, and did not unlawfully convert the said property to his own use, and that said Baker is entitled to judgment in his favor in this action." This was an adjudication in this action that at the commencement of the action the plaintiff was not entitled to the possession, and judgment was entered in favor of the defendant, Baker, on this ground. From this judgment the plaintiff has not appealed, and it, therefore, stands as finally adjudged that the plaintiff was not entitled to the possession at the commencement of the action.

But the court finds certain facts from which it concluded, as a matter of law, that the other defendant, Meyer, had con-

verted the wheat, and entered a judgment against him for its value, and from this judgment Meyer appeals.

In this class of action the rule is of universal application that the plaintiff cannot recover unless, at the commencement of the action, he was entitled to the immediate possession of the property: Bouvier's Institutes, secs. 3519, 3520, 3524, and authorities there cited.

In this action, it having been adjudged that the plaintiff was not entitled to the immediate possession, and this adjudication not having been appealed from, and remaining still in force, the plaintiff is concluded by it, and it results that the plaintiff was not entitled to recover, in this form of action, against the defendant, Meyer.

P. F. TULLY, Respondent, v. M. TRANOR, Appellant.*

No. 5040; October 12, 1877.

Conversion—Measure of Damages.—The Amendment to Section 3336 of the Civil Code, whereby one suing with reasonable diligence for the wrongful conversion of personal property could no longer assess the detriment presumable as at the highest market value between the conversion and the verdict, was intended to be retrospective.

Conversion—Measure of Damages.—The Amendment to Section 3336 of the Civil Code, whereby one suing with reasonable diligence for the wrongful conversion of personal property could no longer assess the detriment presumable as at the highest market value between the conversion and the verdict, does not impair the obligation of contracts within the inhibition of the constitution of the United States.

Conversion.—A Law Changing a Rule of Presumption as to the Measure of Detriment to be claimed in an action for wrongful conversion does not deprive a plaintiff of a vested right.

Impairment of Contract.—A Law Directed at a Remedy Merely cannot be Said to impair the obligation of contracts, when the effect is not to take away all redress.

APPEAL from Twelfth Judicial District, San Francisco County.

*For subsequent opinion, see Tully v. Tranor, 53 Cal. 274.

Purdy & Harrison for respondent; Barber & Naphtaly for appellant.

McKINSTRY, J.—When this action was commenced, section 3336 of the Civil Code read:

"The detriment caused by the wrongful conversion of personal property is presumed to be,—1. The value of the property at the time of the conversion, with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and 2. A fair compensation for the time and money properly expended in pursuit of the property."

Prior to the trial of the cause in the district court the section was amended by striking out therefrom the words: "Or where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict without interest, at the option of the injured party."

There can be no reasonable doubt that the amendment was intended to be retrospective, and applicable to a case in which the conversion had occurred prior to its passage. The general language covers all cases of wrongful conversion; the expression "is presumed to be" indicates that it was intended to establish a legal presumption to operate, and which could only operate, at the trial of the cause; and section 286 of the amendatory act (Amendments to the Codes of 1873–74, p. 268) repeals all provisions of law inconsistent with the act. It is true the same section provides, "no rights acquired or proceedings taken under the provisions repealed shall be impaired, or in any manner affected by this repeal." But this only renders it the more apparent that—except as to the rights acquired or proceedings taken under the repealed law—the amendments were intended to operate retrospectively, so as to include all cases of previous conversions.

In the present case there is no question as to the validity of any proceedings prior to the time when the amendment to section 3336 took effect; nor can it be seriously claimed that the amendment—construed as applicable to plaintiff's case—

is repugnant to the constitution of the United States because violative of the "obligation of a contract."

The only question to be considered, therefore, is whether the plaintiff will be deprived of a vested right if the amendment be held to be applicable to his case. "A retrospective statute affecting and changing vested rights is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void. But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and go only to confirm rights already existing, and in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations": 1 Kent's Com. 455.

It may be assumed (for the purposes of this decision only) that plaintiff, having suffered an injury for which the existing law afforded him a remedy, could not have been deprived by legislative act of every means of redress. But the rule found either in the first or second clause of section 3336 of the Civil Code, as it stood prior to the amendment, is arbitrary. It does not purport to supply a standard by which exact compensation may be determined in every case. "The detriment shall be presumed to be"—that is to say—"it is impossible to determine the exact amount of injury; it cannot be said in a given case that the party injured would have retained his property until the date of the trial of the action had it not been converted; or that he would have sold at the highest price or lowest price. It is better then to fix the rule of damages, one in itself simple, and which on the whole shall approximate the actual damages."

We can conceive of no principle of constitutional law which is violated by a change in this rule, unless, at least, the new rule on its face deprives the party of every reasonable method of securing just compensation. No case has been referred to in which it has been held that to change the rule of damages in cases of tort was a deprivation of any vested right of one who had previously suffered the wrong, and we can see no reason why it should be so held, even if it should be made to appear in a particular case that the plaintiff would not recover as much as he would have done had the former rule been continued.

In the present case the district court did not find the value of the property at the time of the conversion, and it follows that the judgment and order are reversed and the cause remanded for a new trial.

We concur: Niles, J.; Rhodes, J.; Crockett, J.

YOUNG v. HOGLAN.

No. 5720; December 10, 1877.

Partnership Accounts—Settlement—Parties.—A settlement of partnership accounts cannot be made in a collateral action in which the partners are not made parties.

Attorneys—Authority in Settlement of Partnership Accounts.—A court cannot enter judgment upon a report of a referee to state the accounts between partners who are not parties to the proceeding, notwithstanding the agreement of attorneys to that effect.

Powell and Rogers were partners in the raising and sale of sheep. Powell sold to defendant Hoglan twelve hundred sheep for three thousand dollars. Hoglan paid fifteen hundred dollars cash and agreed to pay to Rogers the balance, provided that amount should be due Rogers from Powell upon a settlement of their copartnership accounts, or to pay any amount found due Rogers upon the settlement.

The claim against Hoglan was assigned to the plaintiff Young, upon which he brought suit.

The court below found the facts as above stated, and, as a conclusion of law, said that the liability of the defendant depended upon the result of a settlement of accounts between Powell and Rogers. Afterward the attorneys on each side consented to the appointment of a referee to take testimony and report what amount, if anything, was due from Powell to Rogers. The referee reported that nothing was due; whereupon the court entered judgment for the plaintiff. The defendants claimed that the suit should have been dismissed because prematurely brought, as no cause of action existed until after a settlement of the accounts between Powell and Rogers.

The supreme court holds that the judgment based upon the report must be reversed, because Powell and Rogers were not parties to the action, and orders the pleadings amended, making them parties.

By the COURT.—A settlement of the partnership accounts between Rogers and Powell, as contemplated at the time of the sale of the sheep by Powell to Hoglan, can only be made in a proceeding to which both Rogers and Powell are parties.

Judgment reversed and cause remanded, with directions to permit the parties to amend the pleadings so as to make Rogers and Powell parties to the action.

NEMIE OSGOOD, Appellant, v. EL DORADO WATER AND DEEP GRAVEL MINING COMPANY, Respondent.*

No. 6061; December 2, 1878.

Waters—Notice of Intent to Appropriate—Relation of Title.—One who posts notice of intention to appropriate the waters of a stream on the public domain, and proceeds with due diligence to actual appropriation, will be deemed to have appropriated the water and been in possession of the same, and the rights appurtenant thereto, from the date of posting the notice.

Waters—Notice of Intent to Appropriate—Conflicting Rights. Where one, from the time of posting notice claiming certain waters, pursues the work of appropriation with due diligence until it is accomplished, the act of Congress of 1866 operates to confirm his claim as of the date of posting the notice, although in the period intervening between the notice and the completion of the work, another person acquires, as against the United States, the title to land through which the stream ran in its natural course.

Waters—Appropriation of Several Streams as Part of System.—In order that work done in appropriating the waters of one stream may be counted toward appropriating the waters of another disconnected stream, the posted notice must declare in terms that the purpose is to acquire the right to the waters of both streams.

APPEAL from Eleventh Judicial District, El Dorado County.

*For subsequent opinion, see Osgood v. El Dorado etc. Min. Co., 56 Cal. 571

T. B. McFarland for appellant; Geo. G. Blanchard, J. Garber and Creed Haymond, for respondent.

McKINSTRY, J.—1. Under and by virtue of the provisions of the act of Congress of July 26, 1866, "granting the right of way to ditch and canal owners over public land," etc., one who has actually appropriated the waters of a stream on the public lands before the acquisition by another of the United States title to a tract of land on the stream below has acquired the exclusive right to the use of the waters appropriated as against such inferior proprietor.

2. It is assumed for the purposes of this case that one who has posted a proper notice and pursued work with due diligence until the appropriation is complete has, under the act of Congress of July 26, 1866, the exclusive right to the water, as against a person who, after the notice and before the actual appropriation was completed, acquired the government title to a tract of land through which the stream ran in its natural course.

3. With this assumption the plaintiff should have had a decree upon the facts of the present case.

4. Whether, according to the local rules and customs recognized by the courts or the judicial decisions of this state, work done toward appropriating the waters of one or more streams on the public lands may ever be considered and treated as work done toward appropriating another separate and independent stream, query.

5. Assuming that it may, yet in order that the work done toward taking out the waters of the one or more streams shall be counted as done toward appropriating the other separate and disconnected stream, the notice posted upon the last must distinctly declare the intention to appropriate the waters of all, and that the water is to be diverted from each as part of a scheme which includes the appropriation of the waters of all.

Under the rules and customs recognized by the courts and the judicial decisions of the state, and as against one attempting to appropriate the same water while the works of the first claimant are yet incomplete, a party posting a notice of intention to appropriate the water of a stream on the public do-

main, and proceeding with due diligence to make actual appropriation, has been deemed to have appropriated the water and to be in possession of the same and the rights appurtenant thereto from the date of the posting of the notice.

The defendant bases its claim to the waters of Echo lake and the outlet therefrom, or "Osgood creek," upon the act of Congress of July 26, 1866 (U. S. Stats. at Large, p. 253). The ninth section of that act provides: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed; provided, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

There can be no doubt that the language of the foregoing section operates, ex proprio vigore, as a grant of the rights and claims embraced within the words employed. It is a recognition by the federal government of the rights already recognized by the state judiciary. We may assume that if, from the time the predecessors of defendants posted a notice claiming the waters of Echo lake, they pursued the work of appropriating such waters with due diligence, until the appropriation was actually accomplished, the act of Congress operated to confirm their right to the use of the same as of the date of the posting of the notice, even although in the period intervening between the notice and the completion of the work, the plaintiff acquired, as against the United States, the title to the land through which the stream ran in its natural course. Thus much we do not admit absolutely, but for purposes of the case before us and as presenting the claim of defendant in its strongest light.

On the 25th of October, 1871, the plaintiff received a patent from the United States for the tract deprived of water by reason of the subsequent diversion of Echo lake and Osgood

creek. From that date, at least, plaintiff became a riparian proprietor. If the predecessors of defendants had not acquired a right to divert the water which would have been available against a subsequent appropriator, the decree should have been for the plaintiff; for certainly the position of the plaintiff when he obtained a United States patent was as favorable as would have been that of a mere appropriator of the water.

We inquire, therefore, had the grantors of defendant acquired a right to the waters of Echo lake, as against the government, or the grantee of the government, when the patent issued to plaintiff?

The first necessary step to be taken by defendant's grantors was to post a notice at or near Echo lake, or the outlet, declaring their intent to appropriate the waters. The notice seems to have been posted at the outlet of Echo lake in the year 1860. The witness Kirk, being asked what were the contents of that notice, answered: "Claiming as a reservoir to keep the water back to supply this ditch which is built on this line, located in 1860; also, claiming the waters of the lake for the purposes of supplying this present ditch." The witness had previously stated that he posted the notice "at the outlet of [Echo lake], where the present ditch starts out," and there can be no doubt that the ditch referred to in the notice posted in 1860 was the contemplated ditch from Echo lake, upon which, as the witness subsequently stated, work was commenced in 1872. There is evidence in the record which may, perhaps, be construed as tending to show that a survey of the line of the ditch leading from Echo lake was made during or prior to the year 1860 (Transcript, pp. 44, 45), but it is quite certain that nothing more was done toward appropriating the waters of that lake until after a second notice was posted. The second notice was posted in February, 1867, and was in the following words and figures:

"In conformity with an act of Congress, entitled 'An act granting the right of way to ditch and canal owners over the public lands, and for other purposes,' approved July, 1866, the undersigned hereby claim, and are by priority of possession, entitled to the use of the water of this stream for mining, manufacturing, agricultural and other purposes, and intend to dam said stream and carry the same, or a portion thereof,

in a flume, ditch or canal, or by natural channels whenever found suitable, to certain mining and agricultural districts, and that the construction of said flume or ditch will not injure any settler on the public domain.

"J. KIRK.
"F. A. BISHOP.

"February, 1867."

From the date of the second notice until the spring of the year 1872, no work was done upon the canal leading the waters from Echo lake. As we have seen, the plaintiff's patent was issued in October, 1871.

It is quite evident from this statement that, treating the effort of defendant's grantors as an independent, separate attempt to appropriate the waters of Echo lake and of the outlet, Osgood creek, they had acquired no right to those waters which could be asserted against the lower riparian proprietor at the time his patent issued to plaintiff.

And this brings us to another question, which must determine the decision of this cause.

It is urged by respondent that an individual or association may acquire a right by appropriation to the waters of any number of disconnected streams on the public lands by posting a notice at the point of intended diversion of each, and that (as against a subsequent appropriator of the water or grantee of the government of lands through which one of the streams may flow) work done on a canal or ditch leading the water from any other of the streams should be considered as done in carrying out a general scheme of conducting the waters from all, so as to give the better right, although no work has been done toward diverting and appropriating the waters of the particular stream prior to the actual adverse appropriation of those waters, or prior to the acquisition of the government title to a tract of land lying upon the stream below.

Without admitting that the principle of "relation" applicable to the acquisition of water rights upon the public lands can be relied upon for the purpose mentioned in the above statement, we are entirely convinced that, to give effect to the notice as evidence of the initiation of a right to the waters of a particular stream when work has been done only toward establishing a conduit for the waters of another and separate stream, the notice should declare in terms that the

purpose was to acquire a right to the waters of both. The notice of itself gives no title, but points one subsequently desiring to acquire rights in the water to work done with reference to the design indicated by the notice. If, after the lapse of a reasonable time, no work has been done toward appropriating the waters, the intention to appropriate which is declared in the notice (or such work has not been prosecuted with proper diligence), a third party may assume that the intended appropriation has been abandoned, and is not required to inquire whether there was a secret purpose in the minds of those who posted the notice to make the appropriation broader than the notice, or a hidden intent that the appropriation should constitute part of a scheme to acquire rights in the waters of many distant and disconnected streams. Certainly he would not be held to have knowledge that work done to divert other streams, in accordance with a notice posted on each of an intention to appropriate its waters, was really done to carry out the design to appropriate the waters of a stream, to divert which no work had been done.

Applying these rules to the present case, there was nothing in the notice of 1860, or that of 1867, to indicate an intention to take up, claim or appropriate other waters than those of Echo lake or its outlet, and the record shows an utter want of diligence in prosecuting the work to make such appropriation actual.

Judgment and order reversed and cause remanded.

We concur: Crockett, J.; Niles, J.; Rhodes, J.; Wallace, C. J.

WELLS, Plaintiff and Appellant, v. HARTER and WIFE, Defendants and Respondents.

No. 6098; January 13, 1879.

Homestead—Mortgage—Extension of Time of Payment.—Where husband and wife declare a homestead on mortgaged premises, an agreement by the payee of the secured note with the husband alone to extend the time of payment will not keep the mortgage on foot as against the homestead. That can be accomplished only by an instrument executed by both husband and wife.

APPEAL from Fifteenth District Court, San Francisco County.

E. A. Lawrence for plaintiff; A. W. Thompson for respondent.

Suit to foreclose a mortgage. The complaint sets out that the plaintiff, being the owner and in possession of the mortgaged premises, sold them to defendant, B. Harter, for two thousand dollars—half cash and half by note and mortgage, dated May, 1869, payable in twelve months, with interest; that the interest was regularly paid to 1874; that in 1875, by an indorsement on the note, it was extended to 1876.

The wife of defendant, in her answer, pleads the filing of a homestead by herself and husband on November 8, 1875, nine months after the new contract, and then the statute of limitations.

Judgment for plaintiffs against the defendant, B. Harter, for the amount of the note only, the court refusing to foreclose the mortgage, and giving judgment in favor of the wife of defendant.

RHODES, J.—Subsequent to the execution of the mortgage, the defendants, Harter and his wife, filed a declaration of homestead on the mortgaged premises. More than four years after the maturity of the note, Harter, the maker thereof, and the plaintiff, the payee, extended the time of the payment of the note for one year. That agreement, even if it would have kept the mortgage on foot, as against the husband, had not the premises been dedicated as a homestead—and it is unnecessary to decide that point—it could not have that effect as against the homestead, for that result could be accomplished only by the joint execution of a proper instrument by both husband and wife.

Judgment and order affirmed.

We concur: Niles, J.; Crockett, J.; Wallace, C. J.

JOSEPH F. BLACK, Respondent, v. J. Q. SPRAGUE, Appellant.

No. 5605; January 13, 1879.

Verdict—Sufficiency as to Form.—Considered in the Light that a verdict must receive a reasonable interpretation and is to be construed in reference to only the controversy before the jury, a verdict in ejectment is not necessarily bad for being in such words as "We find for the plaintiff according to the patent and assess the damages at five cents per acre per year."

APPEAL from Third Judicial District, San Francisco County.

William Irvine for respondent; Moore, Laine & Leib for appellant.

CROCKETT, J.—The action is ejectment against several defendants, for the recovery of fifteen hundred acres of land, claimed by the plaintiff to be included in the patent for a confirmed Mexican grant, under which the plaintiff deraigns title. The defendant Sprague (who is the only appellant) disclaimed title to all the land in controversy, except a tract of one hundred and seven acres or thereabouts, which he claims under a patent from the United States, issued to him as a preemptor, subsequent in date to the patent under which the plaintiff claims. The cause was tried with a jury, and at the trial the sole controversy was as to the correct location of the line called for in the plaintiff's patent, as running from station 24 to station 25; the defendant claiming that station 25 was at a post set in a mound of stones, while the plaintiff claimed that the correct location of that station was at another post in the vicinity set at the time of the survey in the field; but which has disappeared. If the defendant's theory as to the location of station 25 was correct, the plaintiff's patent would include none of the land patented to Sprague. On the other hand, if the plaintiff's theory was correct, his patent included one hundred and seven acres or thereabouts,

of the land embraced in Sprague's patent. So far as Sprague was concerned, the only question before the jury was as to the correct location of the line in the plaintiff's patent from station 24 to station 25; and after hearing the evidence and the charge of the court, the jury returned a verdict in these words: "We find for the plaintiff, according to the patent, and assess the damages at five cents per acre per year." The defendant excepted to the verdict as void for uncertainty; but the court received it and entered a judgment for the plaintiff, without damages. The defendant renews, on this appeal, the proposition that the verdict is void and will not support the judgment.

But the verdict must receive a reasonable interpretation, and is to be construed in reference to the only controversy which was waged before the jury. The verdict could not have been for the plaintiff, except on the ground, that he had convinced the jury of the correctness of his theory as to the proper location of the disputed line; and if that theory was correct, it is not denied that the plaintiff's patent, included the one hundred and seven acres or thereabouts, claimed by Sprague under his patent. The words "according to the patent," found in the verdict, may be rejected as surplusage, in view of the only question of fact on which the jury was to pass; and at most it was only an awkward method of expressing the fact that the plaintiff's patent included the premises in controversy.

The defendant excepted to several of the instructions given to the jury; but after a careful examination of the judge's charge, we think it placed the law of the case fully and fairly before the jury, and that the objections urged by the defendant are hypercritical.

Judgment and order affirmed.

We concur: Wallace, C. J.; Rhodes, J.; McKinstry, J.; Niles, J.

PEOPLE v. LEEHEY.

No. 10,394; September 13, 1879.

Grand Larceny—Theft of Horse—Value as Criterion.—Under section 487 of the Penal Code, larceny of a horse or mare is grand larceny, though the value of the animal is less than fifty dollars.[1]

Embezzlement of Horse—Punishment—Section 514 of the Penal Code is not to be construed so as to make the embezzlement of a horse or mare punishable as less than grand larceny.

By the COURT.—The indictment in this case is for the embezzlement of a mare, alleged to be of the value of fifty dollars, and the defendant having been found guilty as charged in the indictment, was sentenced to the state prison for a term of years, and appeals from the judgment.

It is insisted that inasmuch as the property did not exceed fifty dollars in value, the punishment could not exceed that for petit larceny. But under section 487 of the Penal Code the larceny of a horse, mare, etc., is grand larceny, without reference to the value of the property; and section 514 of the same code provides that "every person guilty of embezzlement is punished in the same manner prescribed for feloniously stealing property of the value of that embezzled."

Under these provisions, the stealing of one of the enumerated animals, however inconsiderable its value, can in no case constitute the offense of petit larceny; and it necessarily results that unless the embezzlement of an animal of the value of fifty dollars or less can be punished under section 514, as for grand larceny, it cannot be punished at all. By section

[1] **Cited** and followed in People v. Gilbert, 57 Cal. 97, where the verdict of the jury was "guilty, as indicted, to the sum of ninety dollars." The court said that this verdict, although not very artistically worded, was sufficient.

Cited and followed in People v. Salorse, 62 Cal. 143, where the trial court was affirmed in having refused an instruction that if the value of the horse did not exceed fifty dollars, the jury must acquit.

Cited and followed in People v. Wickham, 116 Cal. 386, 48 Pac. 329, where the value of the horse stolen was only forty dollars.

503, embezzlement is defined as "the fraudulent appropriation of property by a person to whom it has been entrusted." This includes all personal property, whether it be of great or little value; and it is, of course, embezzlement, and therefore a public offense, though the property be less than fifty dollars in value. The only punishment for the offense is that prescribed by section 514; and if under that section the embezzlement of an animal worth fifty dollars or less cannot be punished, we shall have the anomaly of a public offense, expressly declared to be such by statute, and for which no punishment has been provided. Any construction of the statute which would lead to so absurd a result should be avoided, if practicable; and we find no difficulty in holding that under the provision that embezzlement "is punishable in the same manner prescribed for feloniously stealing property of the value of that embezzled," it was intended that the embezzlement of an animal worth fifty dollars or less should be punished as grand larceny.

We deem it unnecessary to notice the other points made by the appellant.

Judgment and order affirmed.

WALLACE, C. J., Dissenting.—When the property feloniously taken exceeds fifty dollars in value, the offense is grand larceny. But if the property so taken be taken from the person of another, the offense is grand larceny even though the value be less than fifty dollars. So if the property taken be of the equine species, the offense is grand larceny, regardless of the actual value of the animal stolen: Penal Code, sec. 487. The statute in these last two cases has ignored mere value in defining the offense of grand larceny.

But in the offense of embezzlement the feature of value is preserved. "Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value [not, as I conceive, of the mere description or character] of that embezzled," etc.: Section 514. Now, it is set forth in the indictment that the value of the mare, which is the subject of the embezzlement charged, did not exceed

the sum of fifty dollars, and yet the judgment of the court below which is now affirmed here is that the prisoner be imprisoned in the penitentiary as though the mare had been stolen instead of embezzled. If the embezzlement of the mare in question be a felony regardless of her actual value, for the reason that she might have been stolen, and if stolen, the stealing would have been a felony, then the embezzlement of any trinket or article of wearing apparel, however small its value, will also be a felony, for the reason that it, too, might have been stolen from the person of its owner, in which case it would have constituted grand larceny per se.

Without now entering upon a more extended discussion of the question, I must dissent from the opinion and judgment of the majority in this case.

SEIDERS v. POST PUBLISHING CO.

No. 5860; September 13, 1879.

Libel—Allegation of Part as Libel—Introduction of Whole.—In a suit for libel, if the complaint contains solely and verbatim one part of the publication as the grievance, an offer in evidence of the whole is no variance although the other part is libelous also.

Libel—Offer of Whole Publication When Part Only Complained of—Objection.—Where in a suit for libel the plaintiff has set out in his complaint only one part of the publication, and at the trial offers in evidence the whole, whereby, in fact, other libels might appear, defendant should shape his objection as for the exclusion of the libels not so set out.

By the COURT.—Action for libel and judgment for the plaintiff, from which the defendant appeals. The only points urged by the appellant are:

1. That there was a fatal variance between the libel declared upon and the publication put in evidence by the plaintiff; and

2. That the publication contained other actionable, libelous charges against the plaintiff in addition to those declared upon,

and that the court below erred in admitting in evidence so much of the publication as was not declared upon.

On the first point, it will suffice to say there was no variance whatever. The complaint copies verbatim so much of the publication as was alleged to be libelous, and omits to refer to other portions of it containing separate and distinct charges against the plaintiff. There was, therefore, no variance. When the whole publication was offered in evidence, the defendant objected to it "on the ground that the same was not the alleged libelous article and matter set forth in the complaint, and that the said article differed and varied from the alleged libel set forth in the complaint." The objection was solely on the ground of variance, and was not tenable, for the reasons above stated. If it was intended to raise the point that so much of the publication as contained separate and distinct libelous matter, in addition to that declared upon was not admissible in evidence, the objection should have been so framed as to raise that point. But no such objection having been interposed, there was no error in admitting the whole publication in evidence.

Judgment affirmed.

Wallace, C. J., and McKinstry, J., expressed no opinion in this case.

PEOPLE v. SMITH.

No. 10,400; October 30, 1879.

Evidence.—The Opinion of a Physician as an Expert may not be asked as to a point it requires no scientific knowledge to determine.

Evidence—Expert Opinion—Gunshot Wound—Inference as to Position of Parties.—Where the proof is that the ball from defendant's pistol entered a named spot in the victim's body, and reached without deflection another named spot, a physician, produced as an expert, should not be asked his opinion as to the relative positions of the parties when the shooting was done.[1]

Evidence—Opinion as to Weapon Used in Homicide.—When it is possible for a described wound to have been made with any one of innumerable weapons, the opinion of a witness should not be asked as to which one of three weapons named to him the wound was made with.

Appeal.—The Transcript Should Contain Nothing Beyond what is necessary to enable the court to consider the points it is asked to decide.

APPEAL from Tenth Judicial District, Colusa County.

Defendant was convicted of murder, and a new trial having been denied him, he appealed.

W. C. Belcher, W. F. Goad and A. L. Hart for appellant; Attorney General Hamilton for respondent.

By the COURT.—The prosecution proved by the testimony of Dr. Tooley that he made a post-mortem examination of the body of Jack Lett; that he found a gunshot wound on his left side, at the third rib; that he found the pistol ball under the skin near the lower point of the right shoulder blade; that he probed the wound and found that the course of the ball was direct, and that the ball had not been deflected from its course. The defendant admitted the killing, but justified on the ground of self-defense. His statements, so far as necessary to be given here, are, that a certain time in the rencounter, while he was going toward his home, he passed near the place where Dave Lett's rifle was lying, when Jack Lett, who had his own rifle cocked and bearing on the defendant, told the defendant not to touch Dave Lett's gun, to which the defendant replied that he did not want the gun, and told Jack Lett to let down the hammer of his gun, when Jack Lett said, with an oath, "I will let you down"; that he, the defendant, instantly seized the rifle by the muzzle and turned it one side, when it was

[1] Cited and followed in People v. Westlake, 62 Cal. 309, where, under similar circumstances, expert testimony was disallowed.

Cited and approved in People v. Lamperle, 94 Cal. 46, 29 Pac. 709, and, by parity of reasoning, applied to the admission of the evidence of a physician as to the probable distance from the body of the victim the defendant's pistol was at the time of the shooting.

discharged; that Jack Lett then reached down to seize Dave Lett's rifle, still holding his own with one hand, when he, the defendant, drew his pistol and fired the fatal shot.

The prosecution, manifestly for the purpose of showing that the defendant's statement was not true and that he was not acting in self-defense, but that he had shot Jack Lett while sitting, asked Dr. Tooley the question: "From your examination of the range of the ball, its place of entrance, and the place where you took it out, what, in your opinion, were the relative positions of the deceased and the party who fired the shot?" And the witness answered that the deceased must have been much below the other party; and when asked how much lower, he answered two or three feet lower.

The subject matter of the inquiry is not one requiring any peculiar scientific study or skill. An ordinary juror is as competent to determine the relative positions of the parties as the most skillful physician or surgeon; and such being the case, the prosecution was not entitled to the opinion of the witness, as a medical expert, as evidence in the case. All the authorities so hold: See 1 Greenl. Ev., sec. 440, and cases cited. There is nothing in the nature of the subject of the inquiry which would enable a physician, however skillful, to give an opinion of any greater value than that of a man skillful in any other profession. In other words, the solution of the question does not require professional or scientific skill.

This question might not be of such vital importance in the case were it not for the fact that much testimony of this character was admitted, to some of which, however, no objection was taken. The physicians who were called as witnesses were permitted to give their opinions in respect to many matters about which the opinions of experts were not admissible. It having been shown that there was a bruise, with clearly defined lines on three sides, on the left shoulder of the deceased, and that there was a small rent—a triangular hole—in the shirt, the witness was asked if the hole was made with the "corner, or side, or the head or pole of the ax," and he answered: "I don't know. I suppose it must have been done by the pole of the ax or corner." He also stated that the blow

which produced the wound must have been given from behind, and that it was given with a small ax, a large hatchet, or a cooper's hatchet. While the opinion of the witness that the wound was produced by an instrument having a smooth, firm face, and square corners, etc., would be admissible, he should not have been permitted to give his opinion that it was produced by one of the three instruments named, as there are very many instruments with which the bruise as described could have been produced.

The transcript contains over six hundred pages, the larger portion of which is useless for any conceivable purpose, as illustrating the points taken or that might, with any plausibility, have been taken on the appeal. Pages are taken up with explanations of a diagram and in pointing out and describing matters by reference thereto, and the diagram itself is omitted. All the formal questions propounded to witnesses, as to their resident, their business and their acquaintance with persons and the like, and the answers thereto, are set out at length, although they can have no possible bearing on the questions arising on the appeals. The making of bills of exceptions in that style does not facilitate, but, on the contrary, greatly retards, investigation of causes on appeal.

Judgment and order reversed and cause remanded for a new trial. Remittitur forthwith.

EUGENE MURRAY, Respondent, v. ALFRED A. GREEN, Appellant.

No. 5673; October 30, 1879.

Ejectment—Purchaser from Plaintiff Pending Action.—A person who, pending an action of ejectment, acquires the plaintiff's title by purchase may, in a subsequent action in which the parties are reversed, rely upon the recovery in the first action together with averments connecting himself with the title of the plaintiff therein; and allegations of the issuing and serving of the writ of possession are immaterial.

APPEAL from Fourth Judicial District, San Francisco County.

E. A. Lawrence and J. F. Sullivan for respondent; B. S. Brooks for appellant.

By the COURT.—The nature and effect of the instrument executed by and between Mary Ann Roussel and husband and McLeran has not been discussed by counsel, but they treat it as a deed of conveyance, and no objection is suggested as to the validity of any of the clauses of the instrument. One of those clauses prohibits McLeran from selling, conveying or otherwise disposing of any of the lands without the written consent of Mary Ann Roussel. The deed of McLeran to Murray, made during the pendency of the action of McLeran v. McNamara et al., having been made without the written consent of Mary Ann Roussel, is absolutely void, as a conveyance of any interest acquired by McLeran under the first mentioned deed, if the above clause is valid.

The habendum clause recites that the premises are held, the undivided half for McLeran, and the other half in trust for said Mary Ann; and another clause provides that if McLeran shall obtain the seisin or possession of any of the lands, such seisin and possession shall ipso facto operate to invest the said Mary Ann with the legal seisin, possession and estate of and in the one undivided half thereof, at her election. It is unnecessary at this time to define the precise effect of each of those clauses, but it is sufficient to say that, if valid, they vested in said Mary Ann or her assigns the legal title to the undivided half of the land in controversy, it being the land which McLeran recovered of Murray in the above-mentioned action.

Pending that action, Mary Ann Roussel and her husband and McLeran executed a deed purporting to convey this land to Moon, and he conveyed the same to Porter, the defendant's lessor, who held the same at the commencement of this action. From these facts it results that Porter holds the entire title to the tract of land in controversy, or the undivided half

thereof—that is to say, the entire title if the deed of McLeran to Murray is void because of the first mentioned clause of the deed, or the title to the undivided half, if he can rely only on the last two mentioned clauses of the deed. The finding, therefore, to the effect that the plaintiff, Murray, is the owner in fee of the premises is contrary to the evidence.

These conveyances were admissible in evidence under the issues formed by the allegations of the complaint and the general denial of the answer. The only matter required to be specially pleaded by the defendant, so far as the case shows, was the recovery of the judgment of McLeran against Murray, and, in connection therewith the above-mentioned deeds to Moon, and to Porter, made during the pendency of the action, and the tenancy of the defendant, under Porter—the deeds and tenancy being required only for the purpose of showing the relation of the defendant to the recovery of the judgment by McLeran against Murray. In order that the parties claiming under the deed of Mary Ann Roussel and McLeran to Moon might have the benefit of that recovery, it was unnecessary to aver the issuing or service of the writ of possession; for it was the judgment, and not the writ or its service, that determined the rights of the parties to that action. The writ of possession and its service inured to the benefit of those parties, they having acquired the title upon which the recovery was had, during the pendency of the action. The proposed amendment of the answer was therefore immaterial and unnecessary.

Judgment and order reversed and cause remanded for a new trial. Remittitur forthwith.

(Wallace C. J. being disqualified did not participate in the decision.)

WILLIAM G. BROWN et al. v. THOMAS HAMBLETON.

No. 6271; November 3, 1879.

Evidence—Letters of Outside Parties.—A letter from a vendor's land agent to the vendee, written after the sale, is not evidence against an outside person in an action by him against the vendee's assign.

APPEAL from County Court, Placer County.

P. Dunlap and W. H. Bullock for appellants; Hale & Craig for respondent.

By the COURT.—The action was brought under the second subdivision of section 1160 of the Code of Civil Procedure, it being alleged that the defendant entered upon the premises during the absence of the plaintiff. The defendant, in order to prove that his entry was not unlawful, introduced in evidence a contract for the sale of the lands by the Central Pacific Railroad Company to Baum; also an agreement between him and the defendant that they were jointly interested in the contract, on certain specified terms; and also oral evidence to prove that B. B. Redding was the land agent of the railroad company, and that Baum had authorized the defendant to enter upon the land, and he then, against the objection of the plaintiffs, introduced in evidence the last paragraph of a letter from Redding to Baum, dated after the above-mentioned contract, which is as follows: "I am sorry that trouble has arisen and hope you will find some way to settle it. But the fact is that the land is yours, and the law gives to you the legal right to do with it as you see proper"; and the defendant at the same time stated that it was offered only for the purpose of proving that the Central Pacific Railroad Company recognized the right of Baum and defendant to make entry upon and hold the possession of the premises in controversy. We are not apprised of the ground upon which the defendant claims that such portion of the letter was admissible in evidence, as he has not filed any points and authorities, but, in our opinion, it was inadmissible for the purpose for which it was offered.

Judgment and order reversed and cause remanded for a new trial. Remittitur forthwith.

E. E. McHENRY and JAMES McHENRY v. FRANK KEITHLEY, C. H. KEITHLEY, HATTIE KEITHLEY, and J. L. SIMPSON, Guardian of the Other Defendants.

No. 6353; November 7, 1879.

Guardianship—Exclusive Jurisdiction of Probate Court.—The probate court, after having appointed an infant's guardian, has sole jurisdiction of proceedings either to settle the past or to insure the future maintenance and education of the infant. The district court has no jurisdiction to order a mortgage of the real estate of the infant.

APPEAL from Sixth Judicial District, Sacramento County.

The plaintiff, E. E. McHenry, formerly the wife of Wm. Keithly, deceased, father of the defendants Frank, C. H. and Hattie Keithley, brought this action alleging that she had incurred a large indebtedness in the education and maintenance of the children; that the indebtedness was secured by a mortgage upon her life estate in certain lands constituting the estate of Wm. Keithley, which mortgage was being foreclosed. She asked judgment that the guardian of the children be required to borrow five thousand dollars upon the children's interest in the land, for the purpose of paying the indebtedness and further maintaining and educating the children. Judgment was rendered for the plaintiff and the defendants appealed.

W. P. Treadwell and C. P. Sprague for appellants; F. E. Baker and J. C. Ball for respondents.

By the COURT.—When a guardian of the estate of an infant has been appointed by the probate court, the jurisdiction of all proceedings instituted for the purpose of paying the indebtedness incurred in the maintenance and education of the infant, or for the purpose of raising money for his future maintenance and education, pertains exclusively to the probate court. The district court, therefore, has no jurisdiction to order the lands of the infant to be mortgaged for the purposes above mentioned.

Judgment reversed and cause remanded, with directions to dismiss the action. Remittitur forthwith.

JOHN P. McKISSICK v. F. E. CANNON and GEORGE POWERS.

No. 6173; November 20, 1879.

Bills and Notes—Stipulation in Mortgage as to Maturity of Note.—A stipulation in a mortgage, making the principal of the note become due and recoverable at once upon default in the interest, is not necessarily invalid for repugnancy to the express terms of the note for payment on a day certain with annual interest.

APPEAL from Twenty-first Judicial District, Lassen County.

Action to foreclose a mortgage given to secure the payment of three promissory notes. Judgment was rendered dismissing the action as to the foreclosure, and retaining it only for the purpose of reforming the mortgage. Plaintiff appealed.

John S. Chapman for appellant; E. V. Spencer and C. McCloskey for respondents.

By the COURT.—On two of the three notes mentioned in the mortgage the interest is payable annually, and if not so paid, it is to draw interest at the same rate as the principal. The mortgage contains a stipulation to the effect that if the principal or interest shall not be punctually paid when the same becomes due, as in the promissory notes mentioned, then the principal sum and interest shall be deemed and be taken to be wholly due and payable, and proceedings may be taken for the recovery thereof. This stipulation in the mortgage was printed, while the copies of the notes were in writing. If the stipulation is valid—that is, if it is not repugnant to the terms of the notes—the action was not prematurely brought, and the court erred in dismissing it, so far as it related to the foreclosure of the mortgage, and retaining it only for the purpose of the reformation of the mortgage.

Stipulations of that character are frequently found in mortgages, and they cannot be justly regarded as inconsistent with the promissory notes intended to be secured. The promissory notes thus secured may not, and it is not requisite that they should, contain all the terms of the agreement made by the

parties. Stipulations to the effect that taxes and assessments paid by the mortgagee shall be added to the principal sum, bear the like rate of interest, and become payable at the same time, are valid, and are not repugnant to the terms of the notes, though not therein mentioned. There is no better reason for holding that the stipulation in this case is invalid on the ground suggested than there would be to hold that a stipulation is invalid as repugnant to the promissory note that provides that if the note is not paid within a specified time, which will occur after the maturity of the note, the mortgagee may institute proceedings for the sale of the mortgaged premises; See Whitcher v. Webb, 44 Cal. 127.

The order of the court dismissing the action, except in so far as it sought for a reformation of the mortgage, is, in our opinion, erroneous.

Judgment reversed and cause remanded. Remittitur forthwith.

PEOPLE v. J. A. DOWD.

No. 10,448; December 27, 1879.

Criminal Trial.—Where a Verdict Against the Defendant is Found Contrary to the Evidence and the court's instructions, the supreme court will reverse the judgment and remand the cause for a new trial.[1]

APPEAL from County Court, Santa Clara County.

J. C. Black, George W. Wells and S. L. Terry for appellant; Attorney General Hamilton for respondents.

By the COURT.—The defendant was indicted under the provisions of section 476 of the Penal Code. The court in-

[1] Cited and approved in People v. Elliott, 90 Cal. 588, 27 Pac. 433, where, on the trial of one charged with forging a check in a firm name, the court said it was necessary, if there was no such firm, and the check was a fictitious one, that the prosecution should have been had under section 476 of the Penal Code, whereas the conviction was under section 470, which, though broad in its scope, was not broad enough to cover the intendments of section 476.

structed the jury that they must acquit the defendant unless it was proven that T. A. Dowd, the name signed to the check in question, was a fictitious person. This proposition is not contested by the prosecution. The evidence failed to prove that fact, and the jury should, on that ground, have acquitted the defendant.

Judgment and order reversed and cause remanded for a new trial. Remittitur forthwith.

McKinstry, J., dissented.

PEOPLE v. GEORGE A. THOMASON.

No. 6166; December 30, 1879.

Taxation—Migratory Livestock—Statement to Assessor.—The act of March 16, 1874, "to regulate the assessment of migratory stock," imposes the duty upon the assessor, when making such assessment, to demand that the owner state if during the year the stock is to be taken out of the county; in default of such demand there is no duty on the owner so to state, regardless of whether he has the removal of them in mind at the time or resolves upon it thereafter.

APPEAL from Sixteenth Judicial District, Mono County.

The facts in this case are similar to those in People v. Shippee, 53 Cal. 675.

Geo. W. Schell for appellant; T. W. W. Davis and G. N. Whitman for respondent.

By the COURT.—The demurrer to the complaint ought to have been sustained. The complaint does not aver that at the time of the assessment, or afterward, the assessor demanded of the defendant the statement required by the first section of the act of March, 1874 (Stats. 1873–74, p. 376). Unless such demand was made, the defendant was not in default, whether he had then determined to remove the sheep to another county or subsequently decided on such removal: People v. Shippee, 53 Cal. 675.

Judgment reversed and cause remanded, with an order to the court below to sustain the demurrer to the complaint. Remittitur forthwith.

Note.—Five other cases—No. 6168, People v. Ramsey; No. 6167, People v. Delaney; No. 6169, People v. Ferry; No. 6164, People v. Dickenson; and No. 6165, People v. McKinney—were decided in the same way upon the authority of the People v. Shippee, 53 Cal. 675.

Ex Parte AH FONG CHI on Habeas Corpus.

No. 10,471; January 13, 1880.

Bail—Magistrate Having Jurisdiction.—Bail in a felony case is a matter for the consideration of the magistrate issuing the warrant, or of some other magistrate of the same county with him.

Original application to be admitted to bail.

David Louderback for petitioner. No appearance contra.

THORNTON, J.—The prisoner was arrested in the city and county of San Francisco on a warrant issued by a justice of the peace of the county of Sacramento, upon a charge of grand larceny, and is now in the custody of the arresting officer, whose duty it is to take her before the magistrate who issued the warrant, or some magistrate of the same county, without unnecessary delay.

We have examined the clauses of the constitution of this state (in section 6, article 1, and section 4 of article 6), and the sections of the Penal Code (sections 811, 818, 819, 821, 822, 824, 931, 936, 949, 981, 982, 1268, 1271, 1273, 1490, 1492, 1592), referred to on the argument, and are all of opinion, the charge being a felony, that in order to procure bail under the constitution and statutes referred to, the prisoner should be taken before the magistrate by whom the warrant was issued, or some magistrate of the county of Sacramento: Penal Code, sec. 821.

It follows from the above that the application to this court to be admitted to bail must be denied, and the prisoner is remanded to the custody of the arresting officer.

STRATHERN v. ROCK ISLAND G. & S. M. CO.

No. 6365; March 3, 1880.

Pleading—Failure to Amend After Demurrer Sustained.—Judgment is properly rendered against the plaintiff who has failed to amend his complaint after a demurrer to it has been sustained.

Judgments—Effect of Satisfaction by Order of Court.—A judgment satisfied of record by order of court is no longer an actionable claim against the person named therein as the judgment debtor.

APPEAL from Twelfth Judicial District, San Francisco County.

W. H. Allen for appellant; Estee & Boalt for respondent.

SHARPSTEIN, J.—The allegations of the complaint in substance, are that one Calderwood obtained a judgment against the defendant corporation for the possession of thirteen hundred and thirty-three and one-half shares of its capital stock, or fifteen thousand six hundred and sixty-six dollars and sixty-six cents. That prior to said judgment, Calderwood, for a valuable consideration, transferred to the plaintiff in this action two hundred and fifty shares of said stock, or two thousand nine hundred and thirty-seven dollars and fifty cents, which would be the equivalent of two hundred and fifty shares of said stock in the event of said judgment being paid in money. That after said judgment was entered, the plaintiff demanded of the secretary two thousand nine hundred and thirty-seven dollars and fifty cents, and he refused to pay that sum, or any part thereof. It appears, however, by another allegation of said complaint that the judgment against the defendant and in favor of Calderwood had been satisfied of record by the order of the court in which it was obtained before said demand was made upon the secretary of the defendant corporation for the sum above specified.

The complaint was demurred to on seven specified grounds, and the demurrer was sustained. We think that it might very properly be sustained upon any one of a majority of the grounds specified. The plaintiff omitted to amend his complaint, and judgment was rendered against him; and from that judgment this appeal was taken.

Judgment affirmed.

HARDEN, Appellant, v. WARE, Respondent.

No. 6486; April 7, 1880.

Mortgage.—There can be but One Action for the Recovery of any debt secured by mortgage.

Mortgage—Foreclosure Ordered Though not Asked in Complaint. Whenever it appears by the pleadings or proof in a case that the plaintiff is entitled to recover judgment upon a debt secured by mortgage, the court may by its judgment direct the sale of the mortgaged property, even though such relief has not been specifically demanded in the complaint.[1]

Actions.—The Old Distinction Between Legal and Equitable Remedies will not prevent a California court, in a simple action to recover on a promissory note, from directing by its judgment a sale of property upon which it has been made to appear that such note was expressly secured.

Action—Mistake of Remedy.—A Suit Does not Fail because of the plaintiff's happening to mistake the form of his remedy.

Bills and Notes.—In a Simple Action to Enforce Payment of a promissory note, allegations in the answer to the effect that the note was secured by mortgage does not constitute a good plea in either bar or abatement.

APPEAL from Fourth Judicial District, San Francisco County.

J. C. Bates for appellant; Chas. H. Phelps for respondent.

SHARPSTEIN, J.—The defendant in his answer does not deny any of the allegations of the complaint, which is in the ordinary form of one upon a promissory note. But it is alleged in the answer that the note sued upon is secured by a mortgage bearing even date therewith, executed by the defendant to the plaintiff upon real estate, which is particularly described in the answer. A copy of the mortgage is annexed to

[1] Cited and approved in Johnson v. Polhemus, 99 Cal. 246, 33 Pac. 908, where the court intimated that if the scope of the case made by the plaintiff involved a foreclosure of the mortgage, the technical manner of bringing the matter into court was a minor consideration.

Cited in Hansen v. Wagner, 133 Cal. 71, 65 Pac. 143, to the proposition that if the answer was defective in not repeating the allegations of the complaint as to the execution of the mortgage, etc., it was aided and the defect cured by the allegations of the complaint.

the answer and made a part thereof. It was recorded on the day of its execution; and the defendant alleges that it has never been foreclosed, released, transferred or abandoned. The court found that the defendant made and delivered the note as alleged in the complaint; that the plaintiff was the lawful owner and holder thereof; that no part of the principal or interest had been paid; and that at the date of said findings there was due to the plaintiff on it the sum of three thousand and fourteen dollars. And the court found that all the allegations of the answer in respect of the execution of a mortgage as security for the payment of said note were true. As a conclusion of law, the court found that the plaintiff held a mortgage upon real estate to secure the payment of the note, which is a "debt" within the meaning of section 726 of the Code of Civil Procedure, and as such must be recovered in an action of foreclosure; and ordered judgment to be entered for the defendant.

If the defendant had not set up the mortgage in his answer, the plaintiff would have been entitled, upon the findings of the court upon the other facts, to a judgment for the amount which he claimed in his complaint. And before the enactment of section 723, Code of Civil Procedure, or any statute embodying a similar provision, the existence of the mortgage would not have affected his right to recover upon the note in an action at law. The section of the code above referred to provides that "there can be but one action for the recovery of any debt . . . . secured by mortgage upon real estate, ... which action must be in accordance with this chapter": Chap. 1, title 10. "In such action the court may by its judgment direct a sale of the encumbered property (or so much thereof as may be necessary), and the application of the proceedings of the sale to the payment" of costs, expenses, "and the amount due to the plaintiff." The judgment in such a case must be the ordinary one of foreclosure.

The exact meaning of the section is not quite clear to our comprehension. For instance, when it says that the "action must be in accordance with the provisions of this chapter," and then omits to state anything in regard to the form of the action or the proceeding in it until the stage is reached where it becomes necessary to render a judgment, the intention of the legislature is not plainly apparent. In the case before us, "but one action" has been brought for the recovery of

debt. To that extent, at least, the case is within the provision of the code above cited. Now, if in this action a judgment can be rendered upon the allegations of the parties which will be in strict accordance with that provision of the code, we know of no valid reason why it should not be done. There is no controversy as to the right of the plaintiff to recover, in some form of action, the sum for which he demands judgment. Conceding, then, that the only judgment to which he is entitled upon the allegations contained in the answer is one in conformity with the provisions of the code bearing upon this question, why is he not entitled to a judgment in that form? It is true that neither party demands such a judgment. But in any case in which an answer is filed, the court may grant to a plaintiff "any relief consistent with the case made by the complaint and embraced within the issue": Code Civ. Proc., sec. 580. If there be no answer, the relief granted to the plaintiff "cannot exceed that which he shall have demanded in his complaint": Id. This clearly implies that whenever it is shown by an answer that the plaintiff is entitled to relief in excess of that which he demands in his complaint, if embraced within the issue, he shall have it. Now, the plaintiff in this case, as before stated, was entitled, upon his own allegations, to a judgment; and the answer simply shows that the judgment should differ only in form from that which is demanded in the complaint. In other words, the defendant should obtain all the relief to which his answer shows him entitled, under the law interpreted as he insists it should be, by having a judgment entered for the amount demanded by the plaintiff, containing a direction for the "sale of the encumbered property," etc. We think that it would be doing no violence to the provision of section 726 of the code to construe it as if it read as follows: "There can be but one action for the recovery of any debt secured by mortgage; and whenever it appears by the pleadings or proofs in a case that the plaintiff is entitled to recover a judgment upon a debt so secured, the court may by its judgment direct the sale of the encumbered property." etc. It seems to us that this would satisfy every requirement of that section. As Comstock, J., says, in Emery v. Pease, 20 N. Y. 64: "This is probably not the view in which the suit is brought, nor is it in accordance with the prayer of the complaint; but relief is to be given consistent with the facts stated, although it be not the relief specifically

demanded: Code, sec. 275. And in determining whether an action will lie, the courts are to have no regard to the old distinction between legal and equitable remedies. Those distinctions are expressly abolished: Code, sec. 69. A suit does not, as formerly, fail because the plaintiff has made a mistake as to the form of the remedy." It is unnecessary to state that our own code in this respect is substantially the same as that of New York. Of course we do not mean to be understood as holding that the plaintiff, upon the allegations of his complaint in the absence of those of the answer, would be entitled to a judgment of foreclosure. But what we do mean is, that the answer shows beyond any doubt that the plaintiff is entitled to such a judgment, and that such a judgment would not be inconsistent with the case made by the complaint, and that it is embraced within the issue. Whether the judgment be in the form demanded by the complaint or in the form which the answer requires that it should be, the plaintiff recovers upon the note sued on; and the only difference is, that in the latter case the judgment directs that recourse shall first be had to the encumbered property for its satisfaction. Beyond that the two judgments would be essentially the same. Besides, we do not think that the allegations of the answer constitute either a good plea in bar or in abatement. We do think, however, that the defendant is entitled to have a judgment rendered in accordance with the case which he makes; and that is all that he can equitably claim. As the statute upon which he relies does not attempt to prescribe the form of action, but does prescribe, in clear and unambiguous language, the form of judgment in a case like that which his answer presents, and as that answer is found by the court to be true, it would seem to follow that the defendant is only entitled to the relief which his answer shows him entitled to. It must be borne in mind, however, that this conclusion is largely based upon the fact that, before the enactment of any statute upon this subject, the plaintiff would have been entitled to the judgment demanded in his complaint, and that the matters alleged in the answer of the defendant would have been wholly irrelevant; and we are not permitted to presume that by the enactment of that statute the legislature contemplated any greater change in the law as it before existed than is clearly expressed in the act by which the change is wrought. As before stated, the only change expressly made in the law

applicable to this case is as to the form of the judgment. In that respect the code relating to the subject must be complied with, and with that in view we make the following order:

Judgment reversed, and cause remanded to the superior court of the city and county of San Francisco, with directions to enter a judgment upon the findings in favor of the plaintiff for the amount therein found to be due him upon the note sued on, together with interest which has since accrued and costs; and that in all other respects said judgment be made to conform to the provisions of chapter 1, of title 10, of the Code of Civil Procedure.

We concur: Myrick, J.; Thornton, J.

HEY SING YECK, Respondent, v. ANDERSON, Appellant.

No. 6772; May 17, 1880.

Constitutional Law.—Forfeitures of Rights or Property cannot be adjudged by legislative act, and confiscations without a judicial hearing and judgment after due notice are void, as being not due process of law.

Constitutional Law—Seizure of Fish Nets and Seines.—Section 636, chapter 1, title 15 of the Penal Code is unconstitutional and void in so far as it declares that all nets, seines, fishing-tackle, etc., used in violation of its provisions shall be forfeited, and may be seized by the peace officer and by him destroyed or sold.

APPEAL from Fifteenth District Court, San Francisco.

King & Rodgers for respondent; O. R. Coghlan for appellant.

McKEE, J.—This was an action of claim and delivery for one net, three boats and fishing tackle alleged to have been taken and wrongfully detained from the plaintiff.

It appears that the property belonged to the plaintiff, who had rented it to certain Chinese fishermen for the purpose of fishing in the tide waters of the state. In December, 1878, these men, who had possession of the property, were catching

fish in what is known as Montezuma cut-off slough, within the jurisdiction of Solano county, by casting and extending their nets more than one-third the way across the slough. That contrivance for catching fish was prohibited by section 636, chapter 1, title 15 of the Penal Code, which declared that "every person who shall cast, extend, or set any seine or net of any kind, for the catching of fish in any river, stream, or slough of this state, which shall extend more than one-third across the width of said river, stream, or slough, at the time and place of such fishing, is guilty of a misdemeanor," punishable by fine or imprisonment, or both. Further, it declared that "all nets, seines, fishing tackle, boats, or other implements used in catching or taking fish in violation of the provisions of this chapter shall be forfeited and may be seized by the peace officer of the county or his assistant, and may be by him destroyed or sold at public auction upon notice posted in the county for five days."

At the time of the fishing the defendant was an acting constable of Suisun township. In that capacity he arrested the men for a violation of the law, and seized their nets, boats, and fishing tackle. The seizure was followed by the prosecution of the offenders, and they were severally convicted and sentenced to pay a fine. No fault is found with the proceedings against them personally. But no proceedings of any kind were taken against the property which had been seized.

The court below found as a fact that the plaintiff knew nothing of the unlawful use of his property by those to whom he had hired it, and did not "connive at or encourage" such use; and it would seem to be harsh justice, to say the least, to deprive him of his property for no guilty act of his own. It may be conceded that the innocence of the plaintiff would not exempt his property from the punishment of a statute, the provisions of which it had been used to violate, if the statute itself had provided for enforcing the punishment by some judicial proceedings against it. Under such circumstances, property used to commit the aggression might be treated as an offender—as the guilty instrument or thing to which the forfeiture denounced by the statute attached—without reference to the character or conduct of the owner. But the statute under consideration contained no provisions whatever for determining whether the property was liable to condemnation

for the forfeiture denounced against it for the criminal acts of those who had it in their possession. It merely authorized a peace officer to seize the property without warrant or process, to condemn it without proof, or the observance of any judicial forms, and to destroy it without notice of any kind, or sell it upon notice posted anywhere in the county for five days.

Such an enactment cannot be harmonized with those constitutional guaranties which are supposed to secure everyone within the state in his rights of liberty and property. "No man," says Mr. Cooley in his work on Constitutional Limitations, "can by his misconduct forfeit his property unless steps are taken to have the forfeiture declared in due judicial proceedings. Forfeitures of rights or property cannot be adjudged by legislative act; and confiscations without a judicial hearing and judgment after due notice would be void as not due process of law."

The cases of the United States v. Brig Malek, 2 How. U. S. 210, 11 L. Ed. 239, and Henderson's Distilled Spirits, 14 Wall. (U. S.) 44, 20 L. Ed. 815, cited in argument by counsel of defendant, arose out of judicial proceedings in rem to subject property to condemnation, for an alleged violation of the criminal or revenue laws of the United States, and they are authority for the principle that forfeitures are not adjudgable by legislative act, except it may be for a violation of the revenue laws; "except," says the supreme court of Michigan, "in those cases where proceedings to collect the public revenue may stand upon a peculiar footing of their own, it is an inflexible principle of constitutional right, that no person can legally be divested of his property without remuneration or against his will, unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him, and be allowed to meet it on the law and facts. Where a debt or penalty or forfeiture may be set up against him, the determination of his liability becomes a judicial question; and all judicial proceedings are required by the constitution to be exercised by courts of justice. He can only be reached through the forms of law upon a regular hearing, unless he has by contract referred the matter to another mode of determination." The law of the land in judicial proceedings requires a hearing before condemnation, and judgment before dispossession.

It follows that so much of the statute under consideration as authorized defendant to arbitrarily seize and destroy or sell the property of the plaintiff for alleged forfeiture without judicial proceedings for its condemnation, or monition or notice, actual or constructive, to its owner, of the charges for which the forfeiture was claimed, and of the time and place for determining them, was unconstitutional and void, and afforded no protection to the defendant for the detention of the property in question.

Judgment affirmed.

We concur: McKinstry, J.; Ross, J.

HIBERNIA SAVINGS AND LOAN SOCIETY, Respondent, v. DENNIS JORDAN, Appellant.

No. 6215; May 19, 1880.

Constitutional Law—Impairing Obligation—Change of Remedy. If the legislature changes the remedy in respect of a contract, it does not thereby necessarily impair the obligation.

Repeal of Statute—Whether Revives Barred Claim.—A claim once barred through neglect by its owner to observe a requirement of a law then in force is not revived by the repeal subsequently of that feature of the law.

Administration—Presentation of Mortgage Claim.—The law in force in 1872 required a mortgage claim, like other claims, to be presented to the administrator for allowance. In 1873 the requirement was done away with, in 1874 it was restored, and in 1876 it was done away with finally.

APPEAL from Fourth Judicial District, San Francisco County.

Tobin & Tobin for respondent; George R. B. Hayes for appellant.

McKEE, J.—The appeal in this case is from a decree of foreclosure of a mortgage which was given by one Ellen Jobson on the second day of March, 1872, to secure payment to

the plaintiff of the promissory note described in the pleadings. The mortgagor (Ellen Jobson) died December 28, 1872, leaving a will which was admitted to probate; and letters testamentary were issued to the defendants, who qualified and entered on the discharge of their duties, and caused publication of notice to creditors of the estate to present their claims for allowance according to law. The first publication was made on February 21, 1873.

The mortgage claim in controversy was never presented to the executors, or any of them, but on the 30th of April, 1877, plaintiff commenced the action in hand to foreclose the mortgage. In the complaint, recourse to any property belonging to the estate other than that included in the mortgage is waived; but the executors claim that the plaintiff's right of action to foreclosure is forever barred by reason of the failure to present the mortgage debt as a claim against the estate, and that is the question.

At the time of the death of the mortgagor, of the appointment of the executors, and of the publication of notice to creditors, the law of this state required creditors of the estate of a deceased to present their claims to the executor or administrator of the estate, on pain of being barred. By section 130 of the old Probate Act it was enacted as follows: "If a claim be not presented within ten months after the first publication of the notice, it shall be barred forever; provided, if it be not then due, or if it be contingent, it may be presented within ten months after it shall become due or absolute." Coexistent with that section, section 136 declared: "No holder of any claim, against an estate shall maintain any action thereon, unless the claim shall have been first presented to the executor or administrator."

Those two sections continued to be the law of the subject under consideration until the codes went into effect on the first day of January, 1873, and the declaratory sections 1493 and 1500 of the Code of Civil Procedure took their place. By section 1493 it was declared as follows: "If a claim is not presented within the time limited in the notice, it is barred forever, except as follows: If it is not then due, or if it is contingent, it may be presented within one month after it becomes due or absolute. When it is made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator and the probate judge, that the claimant had no notice,

as provided in this chapter, by reason of being out of the state, it may be presented any time before a decree of distribution is entered. A claim for a deficiency remaining unpaid after a sale of property of the estate mortgaged or pledged, must be presented within one month after such deficiency is ascertained."

And section 1500 declared that "No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following cases: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the state subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint."

But on the 25th of March, 1874, sections 1493 and 1500 were amended so as to read as follows:

"Sec. 1493. If a claim arising upon a contract heretofore made be not presented within the time limited in the notice, it is barred forever, except as follows: If it be not then due, or if it be contingent, it may be presented within one month after it becomes due or absolute, if it be made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator, and the probate judge, that the claimant had no notice, as provided in this chapter, by reason of being out of the state, it may be presented any time before a decree of distribution is entered. A claim for a deficiency remaining unpaid after a sale of property of the estate mortgaged or pledged, must be presented within one month after such deficiency is ascertained. All claims arising upon contracts hereafter made, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator and the probate judge, that the claimant had no notice, as provided in this chapter, by reason of being out of the state, it may be presented at any time before a decree of distribution is entered."

"Sec. 1500. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator."

Both sections were to take effect on the 1st of July, 1874.

It will be observed that section 1493, as it existed before and after July 1, 1874, required the holder of any claim to present it on pain of being barred. If he wished, as a creditor of the estate, to secure payment of his claim out of the assets of the estate, he was bound to make presentation within the time prescribed. That was the law as it stood on the 2d of March, 1875—the day that the mortgage debt in this case became due; and by the law the plaintiff had thirty days after it became due to make presentation of it. The thirty days expired April 2, 1875; and, as has been already said, the debt and mortgage in controversy never were presented to the executors, or any of them. As a claim against the estate, the debt and mortgage were therefore, according to the express provisions of section 1493, forever barred, unless it be that the law, as it existed during the administration of the estate, before the time of the bar of the statute had expired, did not impose upon the plaintiff the duty of presenting the debt and mortgage at all.

But the word "claim," as used in the law which was in existence before and after July 1, 1874—the date when section 1493 as amended took effect—comprises all debts and rights of action, all claims which existed at the time of the death of deceased, and could be asserted after his death against his estate in a court of equity. A mortgage debt created by a deceased person in his lifetime, whether it be due at the time of his death or thereafter, is one which may be asserted in a court of justice after his death; therefore it is a claim within the intent and meaning of section 1493, and must be presented. Presentation is required for two purposes—first, to secure payment of the debt out of the assets of the estate (an executor or administrator, as trustee of an estate, is entitled to know what debts and legal obligations exist against the estate, so that he may prepare to apply the assets in his hands to their discharge in the course of his administration); and secondly, presentation is necessary to keep alive the remedy upon the debt, and so to uphold the remedy upon the mortgage: Fallon v. Butler, 21 Cal. 24, 81 Am. Dec. 140; Willis v. Farley, 24 Cal. 490; Pitte v. Shipley, 46 Cal. 154; Harp v. Calahan, 46 Cal. 222.

If the mortgage debt be not presented, it is barred, and the remedy upon the mortgage is also barred; for as the

mortgage is but the incident of the debt whose payment it is given to secure, whatever bars the remedy upon the debt is effectual as a bar to the remedy upon the mortgage: Lord v. Morris, 18 Cal. 482; Heinlin v. Castro, 22 Cal. 100; McCarthy v. White, 21 Cal. 495, 82 Am. Dec. 754.

Attack is made upon section 1493, upon the ground that it is unconstitutional because it is said to be too restricted as to the time for enforcing the remedy upon claims to become due, and because it is retroactive upon vested rights of the plaintiff in the claim itself, and therefore impairs the obligation of the contract.

But when the corporation plaintiff took the note and mortgage in suit, it did so not only in view of the law as it then existed, but subject to the legal effect which the death of the mortgagor might have upon the remedies applicable to the note and mortgage. The rights and duties of parties to a contract are, of course, fixed by the terms of the contract itself; these cannot be changed by any legislation. But when the note and mortgage were given, the law which required presentation to be made of them, in case of the death of the maker, existed and entered into them as part of the contract itself; and no obligation of the contract is therefore impaired by that requirement, for it is one which relates merely to the remedy, and the remedy for enforcing all contracts—past as well as future—is subject at all times to the control of the legislature. That body must, of course, exercise its powers within constitutional limits. It cannot pass a statute of limitations which would deprive a person of all remedy, or restrict him unreasonably in time for availing himself of the remedy which is given. Time for the assertion of a right for enforcing the collection of a legal demand by judicial proceedings, which the statute of limitations purports to bar, must be reasonable. But the law under consideration is not open to the objection that it deprives the holder of a claim against an estate of all remedy, or that it unreasonably limits him as to time; for presentation is itself a remedy—it is in the nature of judicial proceedings against an estate, and as a remedy it is effectual for enforcing the collection of the claim. If allowed by the representatives of the estate, a quasi judgment is rendered in favor of the claimant, which ripens into a final judgment when the probate court, in which the estate is being admin-

istered, directs it to be paid. If rejected, the law affords ample time for the purpose of suit: Code Civ. Proc., sec. 1498. Whether it be a claim which should be allowed or rejected, the representative of an estate is entitled to know of its existence; for as trustee of the estate it is his duty to ascertain the legal demands against it, so that he may allow and settle them in due course of administration without wasting the estate in unnecessary litigation. For that purpose the holder of the claim in question could have availed itself of the legal remedy of presentation at any time before or after publication of notice to creditors of the estate of the deceased mortgagor, until the expiration of thirty days after the claim became due. It was not necessary for the plaintiff to delay presentation until it did become due. In Ricketson v. Richardson, 19 Cal. 330, the court says: "The statute does not require a presentation of the notes, etc., to be postponed until after publication of notice by the executors, but the holder may anticipate such publication." So that, having had all the time from the grant of letters testamentary to the executors until thirty days after the claim became due, it cannot be said that the law which required its presentation within that time is unreasonably restricted in time.

Nor did the repeal of section 1500 as it existed before July 1, 1874, devest the plaintiff of any vested right in the claim. That section related also to the remedy. It gave the holder of a mortgage debt the right to foreclose the mortgage without presentation of the claim to the executor or administrator of the estate, upon the condition that he waive all recourse against any other property of the estate. But before the claim of the plaintiff had become due, so that the plaintiff in this case could avail himself of the remedy, the legislature repealed the law; and it is well settled that legislation that affects the remedy merely and does not deny the right is not open to objection upon constitutional grounds: Stoddart v. Smith, 5 Binn. (Pa.) 355; Ogden v. Saunders, 12 Wheat. (U. S.) 270, 6 L. Ed. 625; Hinckle v. Riffert, 6 Barr. (Pa.) 196; Cooley's Constitutional Limitations, 287. So in Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515, where an act of the legislature was passed as a substitute for a statute of redemption, the supreme court held that the act repealed the old rule of

redemption and provided for a new rule, and that the right to redeem was only a privilege given by statute; but, as it depended upon statute, it was a provision which might be repealed at any time. "The legislature," says the court, "may repeal or alter the provisions of the act so as to affect those who have not yet availed themselves of the statutory privilege, or, at all events, who are not yet in a condition to so avail themselves."

It is true that the legislature on the 15th of March, 1876, restored the remedy; and it is now as a remedy existent, and was at the commencement of this action; but in the meantime the claim in controversy had become "barred forever." The restoration of the remedy did not revive the claim. It was forever barred. No legislation could restore it again to validity as a claim against the estate represented by the defendants. The bar became a vested right in the estate, of which it could not be devested by subsequent legislation.

Judgment reversed and cause remanded.

I concur: Ross, J.

McKINSTRY, J.—I concur. The claim was never presented to the executors, and the right of plaintiff to sue accrued, if ever, at or subsequent to the date (March 2, 1875) when the mortgage debt became due. But as the law was at that date, and ever since has been, the plaintiff is expressly prohibited from maintaining the action by reason of the failure to present the claim. Nor—even assuming that the changes in the statutes are other than such as relate to the remedy—can plaintiff assert that the obligation of the contract has been impaired. At the time when the note and mortgage were executed, the law declared that no action should be maintained upon a claim which should not be presented to the executor and administrator. The plaintiff contracted with reference to the then existing law, which was substantially the same as the law in operation when the mortgage debt became due. For a portion of the period intervening between the two dates above mentioned, the statute authorized the foreclosure of a mortgage simply, although the claim which it was given to secure was not presented; but the plaintiff did not thereby acquire a vested right to maintain this action.

HELLMAN, Respondent, v. ARPIN et al., Appellants.

No. 6736; July 2, 1880.

Notice—Occupant of Mortgaged Land—Diligence of Mortgagee. The mortgagee of land occupied exclusively by a person other than the mortgagor must, in order to disprove notice of a claim, show that he sought with the utmost diligence to be informed of the rights of such person to the land, but vainly.

Notice—Occupant of Mortgaged Land—Quality of Possession. To put the mortgagee on the inquiry, the possession of a person other than the mortgagor must be open, visible, exclusive and unambiguous.

Notice—Occupant of Mortgaged Land.—After a Positive Finding to the effect that the plaintiff took and recorded his mortgage without notice of the occupant's claim, it will not be inquired into on appeal whether the evidence did not tend most strongly to favor the occupant.

APPEAL from Seventeenth Judicial District, Los Angeles County.

A. H. Judson for respondent; Bicknell & White and J. S. Chapman for appellants.

McKINSTRY, J.—It may be admitted that one who takes a mortgage of land in the sole and exclusive occupation of another than the mortgagor can disprove notice of that other's claim only by showing that he made every proper inquiry in respect to the rights of the possessor, and failed to obtain information. That such be the effect of a possession, however, it must appear that the possession is open, visible, exclusive and unambiguous: 3 Washburn on Real Property, 284. Open and notorious possession is sufficient to put a purchaser on inquiry: Lestrade v. Barth, 19 Cal. 660, 676; Fair v. Stevenot, 29 Cal. 490. The sixth finding of the court below is as follows:

"That the defendant Arpin had resided on the land in controversy several years prior to his deed to Levy, and has continued to reside thereon ever since, having a house on said land, and having cultivated the same every year, but not having the same inclosed; that he is an unmarried man, living alone, and frequently goes to the city of Los Angeles;

and it did not appear whether he was actually on the land at the time the mortgage was executed, or whether he was temporarily absent therefrom."

We are not authorized to say that a finding of these facts necessarily determines the defendant's open and notorious possession, or conclusively determines that plaintiff was put upon inquiry, as against the positive finding (No. 7) that plaintiff, when he took and recorded his mortgage, had no notice of the claim of defendant Arpin.

Judgment and order affirmed.

We concur: McKee, J.; Morrison, C. J.

PEOPLE, etc., Respondent, v. BENITO VALENZUELLA and RAFAEL VALENZUELLA, Appellants.

No. 6596: October 18, 1880.

Larceny.—The Crime of Larceny is Complete When the felonious taking or asportation is consummated.[1]

Larceny—Venue—County into Which Goods are Taken.—Section 786 of the Penal Code, authorizing a trial in the county into which the property has been brought, contemplates property "taken by larceny" in another county and a completed offense in that other county.

Larceny—Venue—County into Which Goods are Taken.—A fresh larceny cannot be imputed to the thief in every county into which he leads or carries the stolen property, as the effect of the law authorizing his being tried in a county into which he has brought such property.

Larceny—Accessory After the Fact.—One Who has not Aided in the theft but, with knowledge of it, accompanies the thief and aids in the care and management of the stolen property, is an accessory after the fact, and should be tried as such and not as a principal.

APPEAL from Superior Court, Ventura County.

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[1] **Cited** and approved in People v. Devine, 95 Cal. 230, 30 Pac. 378, in respect of section 485 of the Penal Code, which has reference, as both decisions hold, only to property lost (that is, in the apparent possession of no one) and not found.

J. M. Brooks, district attorney, for respondent; J. G. Howard and Williams & Williams for appellants.

McKINSTRY, J.—The information charged grand larceny, and the jury found the defendants guilty as charged. The court instructed the jury: "Under our law a larceny is committed in every county into which the thief takes the property." The crime of larceny is complete when the felonious taking or asportation is consummated—that is, when the goods are removed from their place of deposit or the lawful possessor is deprived of their possession. If the party who has been guilty of larceny in one county can, under our statute, be indicted and tried in another county to which he has removed the stolen property, this may be a convenient rule with respect to procedure, but does not continue the defense as a mere attempt into the county to which the property is taken. Certainly one cannot be convicted of larceny before a larceny is committed; and the suggestion, if adopted, that the larceny—although the thief has obtained entire control of the property in one county—is still "in fieri" in the other county to which the property is subsequently taken, would lead to the result that the party who had feloniously taken and carried away personal property could not be tried where every fact constituting the offense occurred, and to the further conclusion that the crime of larceny is not consummated until the thief is arrested or has parted with the stolen property. The section of the Penal Code (786) which authorizes a trial in the county to which the property has been brought authorizes such trial when the property "has been taken by larceny" in another county, and contemplates a completed offense in such other county.

Nor can it be said that the thief has committed a new larceny in every county through which he leads or carries the stolen property. It would hardly be contended that he could be tried in each county as for a different crime.

If the foregoing were the only portion of the instructions given to the jury obnoxious to criticism, it is possible we might hold that, under the circumstances, the error could not have injured the defendants. But a like mistake pervades another portion of the instructions. The court said:

"When one person engages in the perpetration of a larceny, and another aids or assists, or, knowing that the party is secreting or making away with the stolen property, goes with him and aids in its management and care, he is equally guilty with him who steals it." The court did not say that such a person "steals" the property, but that he is "equally guilty" with him who steals it. The instruction assumes the larceny to have been completed, and that the person supposed to be "equally guilty" has had no knowledge of the larceny before or during the time of its commission. The jury was told in effect that if one acquires knowledge that another is secreting or disposing of property already stolen, and then aids in secreting it or in its disposition, he may be convicted of the larceny which preceded his acquaintance with the transaction.

Under our Penal Code (section 971) an accessory before the fact may be indicted, tried and punished as principal; but he must be accessory before the fact. A person in the attitude supposed by the instruction would be guilty as accessory after the fact, and should be tried as such and not as principal. Section 32 of the Penal Code provides: "All persons who, after full knowledge that a felony has been committed, conceal it from the magistrate . . . . are accessories" (after the fact). The charge was erroneous.

Section 485 of the Penal Code was not referred to at the argument, and has no bearing upon the question before us. That section relates in terms to property lost (in the apparent possession of no one) and found.

Judgment and order reversed and cause remanded for a new trial.

We concur: McKee, J.; Ross, J.

PEOPLE, Respondent, v. FRANCISCO SALAZAR, Appellant.

No. 10,547; October 21, 1880.

Larceny.—An Indictment Charging That the Defendant, on a day and in a county named, "did unlawfully and feloniously take, steal and carry away one horse, of the personal goods and chattels of one ———," naming the owner, etc., is sufficient.

Larceny—Horse-stealing—Sufficiency of Evidence.—Identification of a Horse by its owner and the latter's testimony that it was stolen from him at the time and place stated in the indictment, together with testimony of one subsequently finding the horse in the prisoner's hands that he did so find it, that the prisoner claimed its ownership and to have raised it, and so effected a sale or exchange of it with witness, is sufficient evidence on which to base a verdict of "guilty as charged," etc., in a prosecution for grand larceny.

APPEAL from Superior Court, Los Angeles County.

Thomas B. Brown, district attorney, for respondent; H. T. Page and F. P. Rameriz for appellant.

ROSS, J.—The indictment charges that the defendant, on the 25th of October, 1879, at the county of Los Angeles, "did unlawfully and feloniously take, steal, and carry away one horse of the personal goods and chattels of one Jose Antonio Perez," etc. The indictment is sufficient: People v. Littlefield, 5 Cal. 355; People v. Strong, 46 Cal. 302.

At the trial Perez testified that the horse in question was his property, and he also gave evidence tending to show that during the night of the 25th of October, 1879, it was stolen from him from the Puento Rancho in Los Angeles county. Another witness on the part of the prosecution, Ellsworth by name, testified that on the 29th of October, 1879, he overtook the defendant riding the horse on the road to Ventura, in San Buenaventura county, in company with another man; that he (Ellsworth) asked defendant whether he would sell the horse; and receiving the reply that he would, negotiations were commenced between them, which culminated in an exchange on the next day, by which the witness gave defendant a mare and colt and ten dollars in money for the

horse; that defendant told witness his (defendant's) father raised the horse; that his father lived near Bakersfield, and that he had a brother near Santa Barbara who was sick, and that he wanted some money to go there in order to help him; that defendant, in making the exchange, talked and understood English to some extent, and that his companion talked and understood it very well. It was also shown on the part of the prosecution that the horse was branded with the brands of one Rowland, by whom it was presented to Perez. Some time after the purchase by Ellsworth the latter ascertained that the horse had been stolen, and delivered it to the sheriff, by whom it was returned to the owner. The defendant, in testifying in his own behalf, denied that he had any conversation with Ellsworth in English, and denied that he could speak or understand English at all. In rebuttal, R. A. Ling, a deputy sheriff of Los Angeles county, testified that on the day of the trial he had conversed with defendant in English, and that the latter understood his questions, and answered them in that language.

In our opinion the evidence is sufficient to justify the verdict of the jury finding the defendant guilty as charged in the indictment.

The judgment and order are therefore affirmed.

We concur: McKee, J.; McKinstry, J.

ROBERT L. FREER, Appellant, v. ROBERT O. TRIPP, Respondent.

No. 5887; October 23, 1880.

Cotenancy—Ouster.—A Refusal by a Tenant in Common in Possession to admit his cotenant into the possession is itself an ouster, and dispenses with further proof on that point.

Cotenancy—Ouster.—In an Action by a Tenant in Common against his cotenant for admittance into the possession, a denial in the answer that the plaintiff has title and right of entry is an ouster.

Cotenancy—Adverse Possession.—A Tenant in Common Does not, by merely occupying and cultivating the premises, have the bene-

fit of the statute of limitations against his cotenant, seeking by action to be admitted into the possession, unless it appears that he held adversely to the plaintiff.

APPEAL from Twelfth Judicial District, San Mateo County.

A. Teague for appellant; C. N. & G. W. Fox for respondent.

ROSS, J.—The plaintiff in his complaint alleges that he and the defendant are the owners as tenants in common of a certain tract of land containing one hundred and twenty-seven acres, or thereabouts, and being a portion of the Rancho Cañada de Raymundo, situated in the county of San Mateo; that the defendant excludes the plaintiff from the possession, wherefore the latter sues to be let into possession with him. The answer puts in issue all of the averments of the complaint, and in addition sets up a former adjudication by the same court of the same issues, in an action between the same parties, in defendant's favor, and also pleads the statute of limitations in bar of plaintiff's recovery.

On the trial the plaintiff introduced: 1. A patent from the government of the United States to Maria Louisa Greer and Manuello Copinger, for the rancho mentioned, of date July 19, 1859. 2. A deed from John Greer and Maria Louisa Greer, his wife, of date March 1, 1858, conveying to the defendant and one Parkhurst all of the interest of the grantors in and to one hundred and twenty acres of the Rancho Cañada de Raymundo and being a part of the land described in the complaint. 3. A deed from the same grantors to the same grantees, of date December 2, 1858, conveying all of the interest of the grantors in and to the remainder of the land described in the complaint. 4. An admission that defendant had acquired the interest of Parkhurst in the land described in the two deeds mentioned. 5. A deed of date July 27, 1866, from Copinger to one Soto, granting to the latter the undivided one-half of the land described in the deeds already mentioned. 6. A deed from Soto to Robert Greer, of date February 26, 1869, conveying the same undivided half interest to Robert Greer. 7. A

deed from Robert Greer to the plaintiff, of date October 15, 1872, conveying to him the undivided half interest in the lands described in the deed from Copinger to Soto, to wit, the lands described in the complaint.

John Greer was sworn and testified on behalf of the plaintiff that the defendant "went into possession of the land described in 1850 and 1852, inclosed it with a fence all around, and has occupied it ever since, using it for a residence, and cultivating, farming and stock raising on it. I never heard of defendant making any claim to the land in question adverse to the plaintiff or those under whom he claimed title."

The plaintiff then offered in evidence "the judgment-roll in case No. 900 of this court, being the suit of the same plaintiff against the same defendant, stating that he did so for the sole purpose of showing from the answer in said suit an ouster and denial of plaintiff's title by the defendant, and read from said answer as follows: Now comes the above-named defendant, and answering to the amended complaint filed in this cause, denies that the plaintiff and defendant are owners in fee and tenants in common of the lands described in plaintiff's complaint, or of any interest therein; and avers that the defendant is, and has been for more than five years previous, the sole and legal owner of said land in his own right."

It is admitted that the lands referred to in the answer read from are the same described in the complaint in this action.

Thereupon the plaintiff rested his case, and the defendant moved the court to grant a nonsuit on the grounds:

"That plaintiff has failed to prove that defendant has ever refused to let him into possession; that the plaintiff has proved that his right of entry is barred by the statute of limitations; that the plaintiff has proved that his right of entry was barred by the statute of limitations long before the commencement of this action; that the plaintiff has proved a former adverse adjudication of his right, and that the cause of action set forth in the complaint was adversely decided against him in another action, for the same cause of action, sustaining the plea of defendant of a former judgment in defendant's favor." And in support of the motion

he read from the judgment-roll in the case of Greer v. Tripp the judgment, which is as follows: "This cause having come on regularly in its order for trial, on the 15th day of September, A. D. 1875, A. Teague, Esq., appearing for plaintiff, and Chas. N. Fox, Esq., for defendant, the plaintiff introduced his evidence and rested his case. The defendant moved the court for a nonsuit on the ground that the plaintiff had failed to show facts sufficient to constitute a cause of action; and after hearing counsel on said motion, the court granted said motion without prejudice to a new action.

"Now, therefore, in consideration of the law and the premises, it is ordered, adjudged, and decreed that the plaintiff take nothing by his complaint in this cause, and that the defendant do have and recover of and from the plaintiff, Robert L. Greer, his costs in this action, taxed at the sum of $42.50.

"Judgment rendered September 15, 1875."

The court below granted the motion of the defendant, and thereupon judgment of nonsuit was entered, from which comes this appeal.

From this statement of the case it will be seen that the legal title to the undivided one-half of the premises sued for vested in the plaintiff on the 15th of October, 1872.

The objection that the plaintiff failed to prove that the defendant ever refused to let him into possession is answered by the defendant's own pleading, where he denies the plaintiff's title and right of entry, and avers himself to be, and to have been for more than five years immediately preceding the commencement of this action, the exclusive owner of the whole of the premises, and in the adverse possession of them.

In Miller v. Myers, 46 Cal. 538, the court said: "It is well settled that a refusal, after a proper demand by a tenant in common in possession, to admit his cotenant into the possession, is itself an ouster, and dispenses with the necessity of further proof on that point. It is equally clear that in an action by a tenant in common against his cotenant to be admitted into the possession, a denial in the answer of plaintiff's title and right of entry is equivalent to an ouster. The action is the most effective demand the plaintiff could make to be let into possession; and if his title and right of entry

be denied, he need make no further proof of the ouster": See, also, Spect v. Gregg, 51 Cal. 198.

The objection that the plaintiff himself proved that his right of entry was barred by the statute of limitations is equally without support. It does not appear from the testimony introduced on the part of the plaintiff that the defendant ever held the premises adversely to the plaintiff or his grantors.

Respecting the alleged former adjudication, the record does not show what the former action was. Neither the complaint nor the substance of it is anywhere given. From that portion of the answer appearing in the transcript and already recited, in which it is denied that the plaintiff and defendant are tenants in common of the property, it may be inferred that the former action was of the same character as the present; but it will not do to indulge in inference for the purpose of holding a party bound by a former adjudication. Besides, it does not appear that the former action, whatever it was, was determined on the merits. The judgment was a judgment of nonsuit, and in it it was expressly declared that it was granted "without prejudice to a new action."

As made to appear in the record before us, it is clear that it is no bar to the present suit.

Judgment reversed and cause remanded for a new trial.

We concur: McKinstry, J.; McKee, J.

GEORGE SHUGGART, Appellant, v. FANEUIL HALL INSURANCE COMPANY, Respondent.

No. 7442; December 7, 1880.

Stipulation to Abide Result of Appeal in Another Action.—A stipulation duly entered into by a plaintiff and a defendant as to the issues in their action, to abide by the decision on similar issues in another action, is to be enforced by the supreme court on appeal.

APPEAL from Tenth Judicial District, Colusa County.

W. S. Goodfellow for appellant; Hart & Bridgford for respondent.

By the COURT.—It having been heretofore stipulated by the parties to this cause that the decision of this court in Shuggart v. Lycoming Fire Insurance Company [55 Cal. 408] shall be the decision in this action, with like effect as if rendered herein, and that a like order and disposition of this cause shall be made herein (with certain provisos, the conditions of which do not exist), and this court having, on the 25th of August, 1880, filed its opinion and rendered its judgment in said case of Shuggart v. Lycoming Fire Insurance Company, reversing the judgment of the court below and remanding the cause, it is ordered that the judgment of the court below in this cause be and the same is reversed and the cause remanded.

F. A. HIHN, Respondent, v. MARY H. SHELBY, Appellant.

No. 6729; December 8, 1880.

Homestead—Land Held in Common.—Under the Civil Code, sections 1237 and 1238, subject only to the limitations mentioned in section 1239, the homestead right may be impressed upon land irrespective of the question whether it is owned exclusively, or in common, or in joint tenancy.

APPEAL from Twentieth Judicial District, Santa Cruz County.

A. Craig and F. Adams for appellant; C. B. Younger for respondent.

ROSS, J.—The disposition of this case depends upon the question whether a certain declaration of homestead, filed by the defendant, Mary H. Shelby, was valid or invalid.

At the time of the filing of the declaration, the premises embraced in it were owned in common by John L. Shelby, the husband of the declarant, and one Hinckley, each owning an undivided one-half. The interest of Shelby was the common property of himself and wife. Shelby, with his wife and her children, resided upon the land, as did also Hinckley, neither having exclusive possession of any part of it.

Under the circumstances, Mrs. Shelby filed, in due form, the declaration of the homestead in question. After she filed it, and while she was residing with her family on the premises, her husband and Hinckley executed to the plaintiff a deed for the whole of the property for the sum of two thousand four hundred dollars, the property being at the time of the value of four thousand dollars. At the time of his purchase the plaintiff knew that Mrs. Shelby resided upon the land with her family, and that she claimed a homestead right thereto. She did not join in the deed to the plaintiff, and refusing to surrender to him possession of the premises, plaintiff commenced the present action to recover possession. The objection made to the homestead is, that the land being held in common, and being in the joint occupancy of both owners, was not subject to a claim of homestead.

Under the homestead laws in force prior to 1868 it was held that a homestead could not be carved out of land held in joint tenancy, or by tenancy in common: Wolf v. Fleischacker, 5 Cal. 244, 63 Am. Dec. 121; Reynolds v. Pixley, 6 Cal. 165, and other cases.

The act of March 9, 1868, provided "that whenever any party entitled to a homestead under the laws of this state shall be in exclusive occupation of any parcel or tract of land having the same inclosed, and shall select and record and reside upon the same as a homestead, such party so selecting and claiming shall be entitled to such homestead, and to all rights and exemptions provided by the general law relating to homesteads, to the extent of such claimant's interest in such homestead property, although such land be held in joint tenancy, or tenancy in common, or such claimant own only an undivided interest therein."

By the provisions of the Civil Code the right to acquire a homestead was still further extended. Section 1237 declares: "The homestead consists of a quantity of land, on which the claimant resides, selected as in this title provided." Section 1238: "It may be selected by the claimant from any land in the possession of the claimant, or of the husband of the claimant."

We find here no limitation as to the title to or the character of the possession of the premises sought to be impressed with the homestead right. In Spencer v. Geissman, 37 Cal. 99,

99 Am. Dec. 248, the court held that the homestead right is impressed on the land to the extent of the interest of the claimant in it, and not on the title merely. And we are of opinion that, under the provisions of the Civil Code above cited, the homestead right, subject to the limitation mentioned in section 1239 of the same code, may be impressed on the land to the extent of the interest of the claimant, or her husband therein, irrespective of the question whether it be owned or possessed exclusively or in common or in joint tenancy.

Judgment reversed and cause remanded.

We concur: McKinstry, J.; McKee, J.

H. J. GLENN et al., Appellants, v. J. P. LACKEY, Respondent.

No. 7158; December 15, 1880.

Stipulation by Parties to Abide—Result of Another Action.—A stipulation duly entered into by a plaintiff and defendant as to the issues in their action, to abide by the decision on similar issues in another action, is to be enforced by the supreme court on appeal.

APPEAL from Tenth Judicial District, Colusa County.

T. C. Lush for appellants; Jackson Hatch for respondent.

By the COURT.—It having been heretofore stipulated in this case by the attorneys for the respective parties that the judgment in this cause shall depend upon and be the same as should thereafter be entered in the case of Glenn v. Arnold, No. 7157, and this court having rendered its judgment in said case of Glenn v. Arnold, affirming the judgment and order of the court below, it is ordered that the judgment and order of the court below in this case, Glenn v. Lackey, be and the same are affirmed.

SANTA CRUZ RAILROAD COMPANY, Respondent, v. THE BOARD OF SUPERVISORS OF SANTA CRUZ COUNTY, Appellant.*

No. 6287; December 28, 1880.

County— Subsidy to Railroad Company —Supervisors— Ultra Vires.—A subsidy, under act of the legislature, voted a railroad company by the people of a county and conditioned, by specific words in the act, upon the construction of the company's road through the county, may be withheld if the company, by an arrangement made privately with the supervisors, constructs the road, not through the county, but only part way; since in such case the supervisors are mere agents with powers measured by the terms of the act, and by departing from those terms, in their arrangements so made, act without authority and so fail to bind the county.

APPEAL from Twentieth Judicial District, Santa Cruz County.

J. H. Skirm and J. H. Logan for appellant; C. B. Younger for respondent.

McKEE, J.—By an act of the legislature of the state, passed April 4, 1870, the people of any county of the state who proposed to aid in the construction of a railroad in their county were authorized to vote upon the proposed aid, at an election to be held on a day and at the places in the county to be named in a notice of election for that purpose. The statute required that there should be stated in the notice the amount of bonds proposed to be issued, and a definite description of the route upon which the railroad was to be constructed; and that the notice itself should be published once a week for at least thirty days before the election. If the election resulted in favor of granting the proposed aid, the board of supervisors of the county were then authorized to enter into a contract with parties for the construction of a railroad upon the proposed route, and to issue bonds pursuant to the contract, bearing interest at seven per cent per annum, payable within twenty years from the date of their issuance,

*For subsequent opinion in bank, see 62 Cal. 239.

and to provide by taxation for the payment of the interest and principal of said bonds as they became due.

By virtue of this authority, the board of supervisors of Santa Cruz county submitted to the electors of the county, at an election called for the fifth day of November, 1872, the question whether they would consent to aid, to the extent of two hundred and forty thousand dollars, in the construction of a railroad in the county, of "not less than a three-foot gauge, and beginning at or near the Pajaro depot, on the Southern Pacific Railroad, in the county of Monterey, and running thence, in the most practicably direct route, through the county of Santa Cruz, crossing the Pajaro river near Watsonville, and crossing the San Lorenzo river between the county road leading to Soquel and the bay of Monterey, and thence along or near the coast to the boundary of said county, near the southeast corner of the Point New Year's ranch."

A majority of the electors voting at the election cast their votes in favor of the proposed aid for the construction of such a railroad; and, on the fourth day of August, 1873, the board of supervisors of the county entered into the alleged contract with the Santa Cruz Railroad Company to carry out the wishes of the people of the county as expressed at the election. In entering into the contract the board acted as the agent of the county. By its general powers it had no contractual capacity to build, or aid in building, railroads in the county. Whatever power it had in that respect it derived solely from the statute of 1870. That statute was repealed in January, 1874. While it was an existing law it was, to say the least of it, of doubtful constitutionality, for a railroad company is nothing more than a private corporation, and it would seem to be self-evident that the legislature had no power to authorize any county in the state to raise money by taxation for the purpose of a private corporation.

Assuming, however, that it was a constitutional enactment, its repeal did not devest the plaintiff of any vested rights which may have been acquired under it while it existed as a law, nor impair the obligation of any contract which may have been entered into under its authority. If, therefore, the board of supervisors, in the exercise of the power conferred by it, contracted with the plaintiff to carry out the intention of the county, courts are bound to maintain and enforce the

contract. But it must have been made by a proper exercise of the authority, for the purpose of effectuating the object which was intended by the people and authorized by the statute.

The authority of the statute of 1870 is obvious In the language of the statute there is no ambiguity; it is plain and unequivocal; it clearly expresses the will of the legislature. Addition or qualification to it by judicial construction is impossible, and the intention of the people of the county as expressed at the election is equally manifest. The statute contains simply a delegation of power to the board of supervisors to carry out the intention of the people, by entering into a contract for assisting, to the extent of two hundred and forty thousand dollars, parties who would engage to construct a railroad upon the route which had been voted on, and this power was to be exercised in the mode and under the conditions expressed in the statute, and for the object intended by the people and authorized by the statute.

In exercising its authority the board was bound to follow strictly the statute. Any contract which it might make with parties must be for the performance of that which the people had voted for. A contract for anything else would be without the authority of the statute and of no legal effect; for parties who enter into a contract purporting to be made by virtue of a statute which authorizes it are chargeable with notice of the statute; and if the contract is not according to the power conferred, and formally and duly exercised, and for the performance of what it authorizes, it is nudum pactum.

Now, when the board of supervisors entered into the contract under consideration, the intention of the people of the county, as it had been expressed at the election which was called for the purpose of ascertaining it, was well known to the board and the plaintiff. That intention was the proposal of the county to any party who might solicit its aid, for the construction of a railroad in the county. The plaintiff, therefore, knew the terms upon which, and the object for which, the aid of the county was obtainable. Knowing these things, it was necessary for it to consent to the terms, or, in other words, to accept the proposal of the county, before there could be any agreement between it and the county which could be formulated into a contract between them; for an agreement

originates in a proposal by one party and an acceptance of it by another.

The proposal of the county was not doubtful, or uncertain, or indefinite. It was an absolute proposal to grant its aid, to the extent proposed, to any railroad company who solicited it, for the construction of a railroad through the entire length of the county upon the route described, and for which the people had voted. Such a proposal could not be accepted conditionally or partially. If accepted at all, the acceptance must be absolute and identical with its terms. Until thus accepted there could be no agreement capable of being clothed in the legal form of a contract. And any contract into which the board was authorized to enter into should express the proposal and acceptance, or the agreement, and the promise made by each of the contracting parties; for the contract being executory, the promise made by one is the consideration for the promise made by the other. Acceptance of a proposal and a direct promise to do what may be included in the proposal are of the essence of an executory contract.

The construction of a railroad through the entire length of the county upon the route which had been submitted to the people, and which they had voted on, being the single object of any contract into which the board of supervisors had authority to enter, it was, therefore, necessary for any railroad company who solicited the aid of the county for the purpose of constructing such a road to engage to construct the same, for that was the consideration necessary to support a promise by the county to pay for, or to aid in, its construction. If no such promise was made by the plaintiff in the contract under consideration, then the promise made by the county to issue bonds to the plaintiff was not binding upon the county; for a contract which rests upon mutual promises must bind both the parties to it or it binds neither. Both the contracting parties must be bound for the performance of their future acts; for though the transaction is one, the rights and duties arising out of it are twofold and reciprocal. A promise by the county to issue bonds to a corporation to aid it in the construction of a railroad, which it does not undertake and agree to construct, is no more binding than the agreement of one who undertakes in writing to convey land to another who neither agrees to buy nor pays anything for the promise: Bean

v. Burbank, 16 Me. 458, 33 Am. Dec. 681; Burnet v. Bisco, 4 Johns. (N. Y.) 335. Both parties to a contract, resting on mutual promises, must be bound or neither is.

It is true that an instrument in writing is presumptive evidence of a consideration; but where the writing itself is made in the exercise of a power conferred by a statute, it must show on its face that it was made in pursuance of the statute, and for the performance of what it authorized; and the rights and duties of the contracting parties must be fixed by the terms of the contract. If there is in it merely a promise by one of the parties to it to pay money for, or to aid in, a work which the statute authorized to be aided or paid for, and the party to whom the promise is made does not by the contract engage to do the work, there is wanting the elements of a contract, and the presumption of a consideration disappears, and the promise to pay the money is gratuitous—a promise upon which no expectations can be based.

Now, in the alleged contract before us the plaintiff did not engage to construct a railroad upon the route which had been voted on by the people of the county. The writing simply recites that the Santa Cruz Railroad Company had organized for the purpose of constructing and maintaining a railroad upon the route; and that "It proposed to construct on said route—first the section of said railroad between a point at or near the Pajaro depot and a point to be thereafter located by the company, on the westerly side of the San Lorenzo river, and within the corporate limits of the town of Santa Cruz"; in consideration of which, and of the agreements named to be done and performed by the company, the county of Santa Cruz undertook and agreed to issue its bonds, etc.

This was a proposal on the part of the railroad company to build only a single section of the road; and it was equivalent to a rejection of the proposal of the county to construct the entire road. It was a counter-proposal by the company which the board of supervisors had no authority to accept or to enter into a contract concerning. But the contract into which they did enter was altogether upon that basis, for the only agreement by the railroad company expressed in the contract is an agreement to build a bridge "over and across the San Lorenzo river on the line of the railroad between the county road leading to Soquel and the bay of Monterey, on the westerly side

of the San Lorenzo river; and to lay the track of a railroad from the easterly bank of the San Lorenzo river to a point on the westerly side thereof within three hundred feet of the bay of Monterey, in three months after the bonds of the county to the amount of ninety thousand dollars shall have been issued and delivered." In no part of the contract does the company bind itself in any way to the construction of a railroad upon the entire route. It especially avoids making any promise, except to lay the track of a single section of the road.

It may be that this section was the most important part of the road, and that its construction was for the best interests of the people of the county.

The alleged contract, indeed, recites that it appeared to the board of supervisors "that the county will be greatly benefited by the construction of such a railroad, or any part thereof"; but the people did not vote upon any part of such a road; and while it may be presumed that the county would be benefited by the construction of a railroad through the entire length of the county, because it might serve to open up the resources of the county to railroad communication, it cannot be presumed that such a result would follow from the construction of a part of the road only. But be that as it may, the people had no opportunity, because they were not called upon, to express their wishes upon that question, and we cannot undertake to determine how they would have decided it if it had been submitted to them. The fact with which we have to deal is that they did decide to aid in the construction of a railroad through the entire length of the county upon the route upon which they voted, and it was solely upon the consideration that parties would undertake and agree to construct a railroad upon that route that they authorized the board of supervisors to contract with such parties for the subsidy voted, and for the payment of which they consented to be taxed. In the absence of an agreement on the part of the plaintiff to construct such a road, in the contract under consideration, the agreement of the county to issue and deliver to it the bonds of the county is not enforceable.

We are, therefore, of opinion that the plaintiff is not entitled to a writ of mandate to compel the defendant to issue

and deliver to the plaintiff the bonds called for by the contract.

Judgment and order reversed.

I concur in the judgment: Ross, J.

I concur in the judgment on the ground that the board of supervisors had no power to make the contract entered into with plaintiff: McKinstry, J.

ALFRED BOREL, Respondent, v. A. G. BOGG, Appellant.

No. 7524; December 28, 1880.

Counties.—The Line Dividing the Counties of Sonoma and Napa, as fixed by a survey approved by the surveyor general under authority of section 3972 of the Political Code, is conclusive.

Constitutional Law—Surveyor General—Judicial Functions.— Section 3872 of the Political Code, making the validity of surveys depend upon the approval of the surveyor general, did not confer judicial functions upon that officer.

APPEAL from Superior Court, Napa County.

Stanley, Stoney & Hayes for appellant; W. D. Bliss for respondent.

By the COURT.—The question in this case is as to the conclusiveness of the survey of the boundary line between Sonoma and Napa counties, as approved by the surveyor general of this state. The court below held that it was conclusive, and refused to receive evidence to contradict the survey.

Section 3972, Political Code, reads: "All surveys finally approved under the provisions of this chapter are conclusive ascertainments of lines and corners included therein."

Either the above section is unconstitutional or the survey is conclusive. It is claimed that the section is unconstitutional, in that it attempts to confer on the surveyor general judicial functions. We do not think that the functions exercised by him are judicial in their character; he is not, under

that section, to decide what is the law. The legislature had already, in regard to the boundary between the two counties, fixed the law, viz., that the summit of the dividing ridge should be the dividing line. We think it was competent for the legislature to direct its officer to go upon the ground and run his lines along that ridge, and in doing so he was acting more in a ministerial capacity; and we think that it was competent for the legislature to declare that the lines so run—that is, the location of the boundary line upon the ground—should be thereby defined and fixed.

No question is presented of improper action on the part of the surveyor general.

Judgment affirmed.

PEOPLE, Respondent, v. AH CHOY and JIM FOO, Appellants.

No. 10,582; January 14, 1881.

Criminal Law.—A Defendant has No Appeal from an order granting him a new trial.

APPEAL from Superior Court, San Joaquin County.

McStay & Swinnerton and W. M. Gibson for appellants; A. L. Hart, attorney general, for respondent.

By the COURT.—The attorney general moves to dismiss the appeal taken by the defendant from an order of the superior court granting him a new trial. No such appeal is authorized by the Penal Code.

Appeal dismissed.

JOHN SILVA, Respondent, v. HENRY DOBBLE, Appellant.

No. 6785; January 20, 1881.

Farming on Shares—Withholding Proceeds—Demand.—Of persons working a farm on shares the claim of one for his share of the profits against the other who has absorbed them all may be put into suit without a preliminary demand.

APPEAL from Third Judicial District, Alameda County.

The parties to this action farmed a tract of land in Alameda county on shares, the land being owned by defendant. A commission merchant firm in San Francisco acted as agent of both parties. Defendant, with consent of plaintiff, shipped the entire crop of 1876 to the agent for sale; but after the shipment defendant instructed the agent to place the entire proceeds to his (defendant's) credit, which was accordingly done. This action was for the share of the proceeds of the sale belonging to the plaintiff. The only defense made was that there had been no demand made upon defendant before the commencement of the action. Judgment for plaintiff; defendant appealed.

E. F. Head and H. Kincaid for appellant; N. Hamilton and W. P. Wiggin for respondent.

By the COURT.—We see no error in the record in this case. The judgment and order are affirmed.

JAMES S. McCUE, Appellant, v. A. W. VON SCHMIDT et al., Respondents.

No. 6693; February 18, 1881.

Municipal Corporations—"Outside Lands"—Holder of Title.—A holder of land in San Francisco by virtue of proceedings entered into by him with all due regularity, and acts done in compliance with the outside land ordinance of the city and county of San Francisco, and of deeds duly given him by said city and county after his having made the required proofs, will be maintained in his possession and ownership, under the authority of Dupond v. Barstow, 45 Cal. 446.

APPEAL from Fourth Judicial District, City and County of San Francisco.

Action to have defendants declared to hold the legal title of certain portions of the outside lands of San Francisco as trustees for plaintiff. The defendants appear to have proceeded regularly under the outside land ordinance of the city and county of San Francisco, and after making their proofs acquired their deeds from the city and county to the property in controversy. Plaintiff claimed that the testimony upon which defendants so acquired their deeds was false, and that he, and he alone, was in possession of the premises as required by the ordinance, and that he, and he alone, was entitled to a conveyance. The defendants demurred, and their demurrer being sustained, and plaintiff declining to amend his complaint, there was a judgment for defendants.

George W. Tyler for appellant; Wm. Hayes and George R. B. Hayes for respondents.

By the COURT.—The question involved in the case was passed on by the court in the case of Dupond v. Barstow, 45 Cal. 446, and upon the authority of that case the judgment is affirmed.

MARY SCHAEFER et al., Appellants, v. THE FRENCH SAVINGS AND LOAN SOCIETY et al., Respondents.

No. 6611; February 23, 1881.

Appeal—Silence of Transcript—Dismissal.—An appeal assuming to be from an order made after final judgment, when the transcript contains no final judgment nor indicates that there has been one, will be dismissed.[1]

[1] **Cited** and followed in Macnevin v. Macnevin, 63 Cal. 186, where after ordering judgment for defendant in a divorce case, but before record accordingly, the trial court, on defendant's application, had vacated previous orders, made from time to time in the progress of case, for alimony and counsel fees. On appeal it was held that the court below was not precluded from so vacating, since there is a distinction between a final judgment and an order for one.

APPEAL from Twelfth Judicial District, City and County of San Francisco.

W. S. Cornwall and J. T. Humphreys for appellants; Jarboe & Harrison for respondents.

By the COURT.—The order of August 2, 1878, was not appealable: Code Civ. Proc., secs. 939, 963.

The transcript contains no final judgment. The order of the 15th of November, 1878, denying plaintiff's motion to vacate and set aside the final judgment "entered on the second day of August, 1878," may have been made for the very reason that no such judgment had been entered. For aught that appears, plaintiff may have made the same mistake in moving to set aside which he made in appealing from the action of the district court of the 2d of August, 1878, and have supposed that the order directing a judgment was a judgment. At all events, so far as appears to this court, no final judgment has yet been entered in the district or superior court, and, as a consequence, no order has been made "after judgment" from which an appeal could have been taken.

Appeals dismissed.

PEOPLE, Respondent, v. WILLIAM CLARKE, Appellant.

No. 10,596; February 24, 1881.

Criminal Law.—An Information Inartificially Drawn and More Verbose than necessary is to be sustained if good in substance.

APPEAL from Superior Court, Monterey County.

Defendant was charged by information with having published a libel upon Alice M. Cullman by writing a false and defamatory letter concerning her, and causing it to be placed in an open place on her premises. The defamatory matter was an attempt to connect her with one Chona Somora, a notorious character of Salinas city, who had been convicted of maintaining a public nuisance. The information set forth at great length and in a rambling manner all the circum-

stances, even the most remote, supposed to bear upon the charge, and contained copies of the indictment against, and sentence, of Chona Somora.

Charles W. Quilty for appellant; A. L. Hart, attorney general, for respondent.

By the COURT.—The defendant was charged, by information, with the crime of libel. He filed a demurrer to the information, which was overruled, whereupon he entered a plea of "not guilty." Subsequently he withdrew that plea and entered a plea of "guilty," after which judgment was pronounced against him. From the judgment he brings this appeal on the ground that the facts stated in the information are insufficient to constitute a public offense.

We have considered the information, and while it is true that it is inartificially drawn, and that the facts constituting the defense might, and ought to, have been more concisely stated, we are nevertheless of the opinion that it is good in substance.

Judgment affirmed.

PEOPLE, Respondent, v. WILLIAM CLARKE, Appellant.

No. 10,595; February 24, 1881.

Criminal Law.—An Appeal from the Overruling of a Demurrer to an information is not entitled to be considered, in the absence of a record showing what the order was. Here, nevertheless, the court examined the information and sustained it as good in substance.

APPEAL from Superior Court, Monterey County.

Charles W. Quilty for appellant; A. L. Hart, attorney general, for respondent.

By the COURT.—This appeal is taken from the judgment alone. The ground of the appeal is the alleged insufficiency of the information. This objection is permitted by the statute to be taken advantage of in three ways, and three ways only—

that is to say: 1. By demurrer; 2. At the trial, under the plea of not guilty; and 3. After trial, in arrest of judgment: Penal Code, secs. 1004, 1012. In the present case the defendant did not attempt to avail himself of but one of the modes allowed by the statute. He filed a demurrer, but what action was taken in the court below respecting it the record does not inform us. There is no order overruling it, and for aught that appears it may have been withdrawn by the defendant himself. We have, nevertheless, examined the information, and find it good in substance.

Judgment affirmed.

LANG, Respondent, v. SPECHT, Appellant.

No. 7471; March 22, 1881.

Appeal.—When a Motion to Dismiss an Appeal is Based upon Two Grounds, but only one is urged, the decision denying the motion is final as to both grounds.

APPEAL from Superior Court, City and County of San Francisco.

J. C. Burch for respondent; F. J. Castlehun for appellant.

McKEE, J.—This is the second motion to dismiss the appeal in this case upon the grounds that the printed transcript of the record was not filed within forty days after the appeal had been taken, nor was a copy of it, or of the written transcript, served upon the respondent; nor is there upon the transcript, as filed, any written evidence of its service, or of a waiver of such service, as required by rule 2 of this court.

The appeal was taken on the 13th of September, 1880. The printed transcript is indorsed, filed December 24, 1880, more than sixty days after the taking of the appeal; and there is nothing in the record showing that the time for filing the printed transcript had been extended. That being the case, the respondent was entitled to move for a dismissal of the appeal. But he has heretofore exercised that right, for on the 6th of December, 1880, he made a motion to dismiss the

appeal on those grounds, and on the additional ground that the appeal bond was insufficient, because "it consisted of an undertaking in the sum of three hundred dollars, coupled with an undertaking to stay execution in the sum of two thousand six hundred and sixty-eight dollars, embraced in one instrument, under section 947 of the Code of Civil Procedure, and the sureties thereto had failed to justify, and no other or sufficient sureties or undertaking had been filed within the time prescribed by law."

That motion was argued by counsel solely upon the last ground, and the court denied the motion, holding upon the authority of Schaet v. Odell, 52 Cal. 449, and Hill v. Finnigan, 54 Cal. 311, that the appeal was not affected by the failure of the sureties to justify. It therefore refused to dismiss the appeal. That decision is decisive of all the points which were involved in the motion.

But it is urged that, although the grounds of the present motion were contained in the precedent motion, they were not taken in argument, and consequently were not passed upon by the decision. The nonargument of them, however, is immaterial. Having been made distinctive grounds of the motion which was submitted and decided, they were presumptively considered by the court, and its decision, whether it referred to them or not, or was valid or erroneous, must be regarded as the law of all the points involved in the motion, and as such is obligatory upon the court and the parties to the action: Jaffe v. Skae, 48 Cal. 540; Yates v. Smith, 40 Cal. 663.

This motion being made upon the same grounds which were contained in the precedent motion is, therefore, dismissed. It is so ordered.

We concur: Ross, J.; McKinstry, J.

GATELY, Respondent, v. BATEMAN, Appellant.

No. 6708; April 15, 1881.

Street Assessment—Sufficiency of Description.—Where the board of supervisors declare their intention that sidewalks on a street be reconstructed, and one lot with a frontage of eighty-six feet is charged in the assessment for new sidewalks with only thirty-nine feet, there being nothing in the assessment or diagram indicating which particular thirty-nine feet is made subject to assessment or that such thirty-nine feet are separately assessed, the description is insufficient.[1]

Street Assessment—Charging Lots Separately.—The superintendent of streets has no power to charge each separate lot with the work done in front of it; if sidewalks between certain termini are ordered reconstructed, all the lots fronting on the street are to be treated as benefited in the proportion that each bears to the whole frontage.

Street Assessments—Separate Charges for Old and New Sidewalks.—The superintendent of streets has no power to make separate assessments on lots for old and new sidewalks, but the assessment must be to each lot for a share of the whole expense of reconstruction in the proportion its frontage bears to the whole.

Street Assessment—Necessity of Appeal to Supervisors.—A property owner is not bound to appeal to the board of supervisors to have a void assessment annulled.

APPEAL from the Fourth District Court of the City and County of San Francisco.

M. Reiley for appellant; J. C. Bates for respondent.

McKINSTRY, J.—This is a suit to foreclose street assessment in San Francisco.

[1] Cited and approved in McSherry v. Wood, 102 Cal. 650, 36 Pac. 1010. In that case the assessment showed on its face that the charge for laying redwood curbs and sidewalks was against only a few certain lots, whereas for sewering, regrading, macadamizing, etc., it was upon the whole district, but the court held the board of supervisors to have acted within their powers here and that the inequality was only apparent. "In the absence of a showing to the contrary," it was said, "the presumption will be indulged that no sidewalks were laid except in front of the lots as shown in the assessment."

The board of supervisors declared their intention and ordered that the sidewalks on Leavenworth street from Pacific to Jackson streets be "reconstructed."

Lot 8 on which it is sought to enforce the assessments—is represented on the diagram accompanying the assessments with a frontage of eighty-six feet nine and one-quarter inches. It is charged in the assessment for "new sidewalks" with thirty-nine feet, but there is nothing in the assessment or diagram to indicate which thirty-nine feet of the eighty-six feet nine and one-quarter inches is made subject to the assessment, and nothing in the diagram indicating that thirty-nine feet of the frontage is separately assessed for any work. The statute requires that the diagram shall show the number of front feet assessed "for work contracted for and performed"—shall show each lot assessed: Laws 1871–72, p. 313. It has been repeatedly held by this court that each lot assessed must be distinctly described upon the diagram.

An objection to the proceedings of the superintendent, at least equally weighty, is based on his attempt to charge each separate lot with the work done in front of it. It may be seriously doubted whether a law which should provide such a distribution of the burden would be constitutional: Woodbridge v. Detroit, 8 Mich. 301; People v. Mayor of Brooklyn, 4 N. Y. 419. But whether the legislature has power thus to provide, it has not thus provided by the law under which the attempt is made to justify these assessments.

As we have seen, the board of supervisors ordered that the sidewalks between certain termini should be "reconstructed." The evident purpose of the statute is to treat such a reconstruction as of benefit to all the lots of land fronting upon the street—in proportion to the whole frontage of each lot: Act of April 1, 1872, passim; Stats. 1871–72, p. 804. The mere fact that more expense or labor is required in making good the sidewalk opposite a particular lot would constitute no sufficient reason why the law should require that lot to pay more than its ratable proportion of the expense of reconstructing the whole sidewalk. It is enough to say, however, that the law does not authorize any such discrimination, or any departure from the mode it prescribes. Yet the superintendent distributed the expense of reconstructing the sidewalks into two assessments, one for "new" and one for

"old" sidewalks—charging some of the lots for new, not for old; some for old, not for new; others, again, in part for new and in part for old sidewalks. By "old sidewalks" we understand to have been intended the portions of the walks repaired, as distinguished from the portions entirely rebuilt, and of new material. An examination of the statute clearly shows the only method contemplated by its provisions of assessing for the reconstruction of sidewalks to be an assessment of all the lots along the reconstructed line, each lot being assessed for a share of the whole expense in the proportion its frontage bears to the whole frontage.

For "new" sidewalks lot 1 is assessed twelve and one-half feet, while it is represented with a frontage of forty feet; lot 2, shown by the diagram to front twenty feet on the reconstructed work, is not assessed at all for "new" sidewalks. Even if the superintendent had power to make two assessments for work done in reconstructing the sidewalks, each must pervade the whole assessment district—must extend to and include, and impose its ratable tax upon, every lot benefited. But part of the lands within the assessment district (and declared by the legislative act to be benefited by the reconstruction of the sidewalks) was not assessed by the superintendent for "new" sidewalks; part of the lands within the district was not assessed for "old" sidewalks. It follows that the assessments for the old and new sidewalks are invalid: People v. Lynch, 51 Cal. 15.

The case is not one of a miscalculation on the part of the superintendent, or of an overcharge upon the particular lot of land. It involves a question of power. So far as the assessments for reconstructing the sidewalks are concerned, the superintendent disregarded the whole scheme of the statute.

The pretended assessments for old and new sidewalks are not assessments. They cannot be corrected, altered or modified (Stats. 1871–72, p. 815), and the property owner was not bound to appeal to the supervisors to have "annulled" that which was already void.

The assessment for "planking and curbs" seems to be regular, and to have been accompanied by a proper diagram.

The order denying defendant's motion for a new trial is reversed, and the court below directed to grant such motion, unless the plaintiff shall consent to modify the judgment in accordance with the views expressed in the foregoing opinion.

We concur: Ross, J.; McKee, J.

TOBELMANN, Respondent, v. ROPER, Appellant.

No. 6791; May 20, 1881.

A Street Assessment Lien cannot be Enforced Against Less Than All of the property owners liable therefor.[1]

APPEAL from Twenty-third District Court, San Francisco.

J. C. Bates for respondent; D. H. Whittemore for appellant.

By the COURT.—On the authority of Clark v. Porter, 53 Cal. 409, and Diggins v. Reay, 54 Cal. 525, judgment and order reversed and cause remanded for a new trial.

F. HOKE, Appellant, v. W. H. PERDUE et al., Respondents.

No. 4707; June 15, 1881.

Reclamation District—Collateral Attack on Organization.—A reclamation district established under the act of March 25, 1868, is legally established if organized by the board of supervisors by virtue of that act, and its corporate existence cannot be attacked collaterally.

Reclamation District—Omission of Land from Tax—Injunction.—The omission of land within the district from the burden of

[1] **Cited** and distinguished in Parker v. Altschul, 60 Cal. 381, where there was nothing to show that the appellant had objected to a dismissal as to some of the defendants.

taxation, however it might serve as a ground for injunction to restrain the collection of the tax, is no ground where the thing to be restrained is the reconstruction or repair of a levee.

Reclamation District—Repairing Levee Constructed Without Regard to Law.—That a levee has been constructed without due regard to the law warranting the construction is no reason in law for refraining from repairing it afterward when it needs repairs.

An Injunction to Restrain the Repairing of a Public Work is not to be Granted on grounds amounting to no more than the petitioner's opinion as to the probable efficiency of the work when done.

APPEAL from Tenth Judicial District, Sutter County.

J. L. Wilbur and Creed Haymond for appellant; J. S. Belcher and J. R. Ray for respondents.

MORRISON, C. J.—Plaintiff filed his complaint in the late district court of Sutter county against defendants, who then constituted the board of supervisors of that county, and prayed "that the defendants be forever restrained and enjoined from reconstructing or repairing said levees or any of them, or from in any manner damming up or obstructing the natural flow of water into and through the said Butte creek slough, and from damming up or obstructing in any manner the natural channels through which the waters that flow into and upon said district and are drained therefrom." We have given the prayer of the complaint, because it illustrates the object and purpose of the suit. The complaint is very long and comprehensive, containing, as it does, something of a history of levee district No. 5, in and for the county of Sutter.

The first allegation in the complaint which we will consider is, that the district was not legally established, for the reason that the petition to the board of supervisors was not signed by more than one-half of the land owners within the district, as was required by section 21 of the act of March 25, 1868: See Laws 1867–68, p. 316. It was held in Dean v. Davis, 51 Cal. 406, that the district organized by the board of supervisors under the foregoing statute became a public corporation, and that the validity of its corporate existence cannot be collaterally attacked or questioned. The complaint also contains an averment that a large quantity of the land lying within the district, and subject to taxation or assessment, has been volun-

tarily omitted from the assessment list filed by the commissioners in the office of the county clerk of Sutter county. If this were a proceeding to enjoin the collection of the tax, we are not prepared to say that the omission complained of would not constitute good ground for enjoining the collection of the assessment: See Levee District v. Huber [57 Cal. 41], opinion filed February 24, 1881. But, as has already been shown, this is not a proceeding to enjoin the collection of the tax, but is simply intended to stop the reconstruction or repair of the levee; non constat but there is a sufficient fund already collected to defray the expenses of such reconstruction and repair.

The allegation that the levee was originally constructed without the previous adoption of a plan for the protection of the district, as provided for in section 10 of the act, constitutes no good reason why the levee, after having been constructed, should not be repaired in places where broken or washed away. But we are not to be understood as saying that the adoption of a plan was at any time essential; for section 3 of the act provides that "the county surveyor of the county of Sutter shall be ex officio engineer of all such levee districts in the county, and shall make such surveys, levels and estimates, superintend all works, and shall give general direction for all their construction, subject to the control of said board of supervisors."

The only remaining point in this case which we deem it necessary to notice is, that the effect of repairing the levee, as is claimed by plaintiff, "will be to dam up the waters, and increase the same in volume, until said levee will break and permit said waters to flow down to and upon plaintiff's land and wash away and destroy the fences and trees thereon." This averment is, and can be, in the very nature of things, a simple expression of opinion on the part of the plaintiff, and cannot be accepted as the statement of a positive existing fact. The intention of the statute, in authorizing the formation of the district, was to adopt a plan and scheme for the protection of lands within the district, from the encroachment of the waters; and the mere opinion of the plaintiff that the scheme

is impracticable affords no reason in law for arresting the work by injunction.

Judgment affirmed.

We concur: Myrick, J.; Sharpstein, J.; Ross, J.

We concur in the judgment: McKinstry, J.; Thornton, J.

PEOPLE, Respondent, v. FRANCISCO SALAZAR and NICHOLAS SEPULVEDA, Appellants.

No. 10,505; August 17, 1881.

Criminal Law—Verdict Uncertain.—When a prosecution is against more than one person, a verdict finding "the defendant guilty," etc., is void for uncertainty.

APPEAL from County Court, Santa Clara County.

Kennedy and Terry for appellants; Attorney General Hart for respondent.

By the COURT.—The defendants were indicted in the late county court of Santa Clara county for the crime of grand larceny; and the case having been submitted to a jury, the following verdict was rendered therein:

"We, the jury, find the defendant guilty as charged in the indictment."

The foregoing verdict, having been entered of record and read to the jury, was by them severally declared to be his verdict, whereupon "it was ordered by the court that the defendant appear for sentence at 10 o'clock A. M. on Saturday, November 6, 1879."

Judgment was entered upon the foregoing verdict against both of the defendants, and the defendant Sepulveda having moved the court for a new trial, which motion was denied, appeals from the judgment and order.

There were two defendants on trial, and a verdict finding the defendant guilty, without specifying which of the two defendants, was void for uncertainty: Richards v. Sperry, 7 Wis. 219; 3 Graham and Waterman on New Trials, 1378.

Judgment and order reversed.

PEOPLE, etc., Plaintiff, v. REDFIELD, Defendant.

No. 7963; August 22, 1881.

Attorneys — Misconduct. — Failure of Testimony to Sustain charges of misconduct preferred against an attorney entitles him to a dismissal of the proceedings.

Foulds for petitioner; Johnson for defendant.

By the COURT.—This is a proceeding for the removal of the defendant as attorney and counselor at law, taken under section 287 and following sections of the Code of Civil Procedure.

Several charges of professional misconduct were made against the defendant, and much evidence was taken in support of the accusation, and also on behalf of the defendant. We have carefully read the evidence, and do not think that the charges, or any of them, are satisfactorily proven.

The proceedings are therefore dismissed.

SAN FRANCISCO, Respondent, v. DAVID CALDERWOOD, Appellant.

No. 2631; September 16, 1881.

Remittitur—Laches in Applying for Withdrawal.—An application made ten years after the issue of a remittitur for a withdrawal of such remittitur is to be denied, unless made upon good cause shown.

APPEAL from Fourth Judicial District, San Francisco County.

J. H. Hunt for respondent.

By the COURT.—Application is made to withdraw the remittitur issued in the above-entitled case. It appears that the remittitur was issued in 1870, more than ten years ago, and no excuse is shown for the laches. This is of itself good ground for denying the application.

Motion denied.

PAGE, Respondent, v. LYNCH et al., Appellants.

No. 7185; September 22, 1881.

Evidence.—A Nonsuit Judgment-roll Establishes No Facts, and, if offered as evidence in a subsequent case between the parties, may properly be objected to as irrelevant and immaterial.

Appeal.—An Exception to an Oral Charge will not be Considered unless it was so specific as to point the trial court to any error in the charge, so that it might be corrected before the retiring of the jury.

Assault—Removal of Trespasser.—In removing an intruder at the request of the owner of the property, the latter's agent has a lawful purpose in view, and he may carry out this purpose provided he use no more force than necessary.

APPEAL from Superior Court, Alameda County.

Lloyd Baldwin for appellants; J. L. Crittenden for respondent.

THORNTON, J.—This is an action instituted by plaintiff to recover of defendants damages for two alleged assaults accompanied by battery. On the trial the jury rendered a verdict for plaintiff. The defendants moved for a new trial, which was denied, and they prosecute this appeal from the judgment and the order denying their motion for a new trial.

The defendants offered in evidence on the trial the judgment-roll in an action for a forcible entry and detainer brought in the county court for the county of Alameda, commenced on the seventh day of March, 1876, on which judgment was entered for the defendants. The defendants in the action were the National Gold Bank and Trust Company, Henry L. Davis, John Doe, James Doe, Richard Roe, Edward

Laparte, Albert Adams, and the defendants in this action, viz., Lynch, Olney, and Cossel. The plaintiff was nonsuited.

Counsel for plaintiff objected to the proposed offer as irrelevant and incompetent. The objection was sustained and defendants excepted.

We cannot see any ground for sustaining the exception of defendants. As the judgment was rendered on a nonsuit, it established no fact as between the parties, so as to make it an instrument of evidence. The mere fact that judgment passed in the action in favor of defendants and against plaintiff was entirely irrelevant and immaterial. The court ruled properly in sustaining the objection of plaintiff's counsel.

The court on the trial gave orally an extended charge to the jury. The charge, as set forth in the bill of exceptions, covers eight pages of the printed transcript. To this charge the defendants' counsel excepted. The exception is stated to have been reserved in this way: "The defendants' counsel excepted to the said charge to the jury, and specifically to each and every portion thereof." In accordance with the rule laid down in Robinson v. Western Pacific R. R. Co., 48 Cal. 425, the exception was not properly reserved. The exception should have pointed out the specific portions of the oral charge excepted to, in order that the judge might have an opportunity, before the jury retired, to correct any error he might have fallen into. As the exception was not properly reserved, it will not be considered.

But we are of opinion that the evidence was insufficient to justify the verdict of the jury. We have examined the entire testimony, and the case made by it is this: That the defendants, having authority from a corporation—the National Gold Bank and Trust Company—on whose behalf they were acting, and whose agents and servants they were, committed the acts complained of to remove the plaintiff, an intruder from a house of which the bank was in the possession; that they demanded that she should depart from the house, which she refused to do; that thereupon they removed her from the house, using no more force than was necessary to accomplish their purpose, which was lawful. The verdict was against law, and a new trial should have been granted.

Judgment and order reversed and cause remanded.

We concur: Myrick, J.; Sharpstein, J.

PEOPLE ex rel. JOHN McCOMB, Petitioner, v. GEORGE TURNER, Respondent.

No. 7864; November 1, 1881.

Attorneys—Misconduct.—Proceedings to Remove an Attorney for professional misconduct are to be dismissed upon the filing of satisfactory affidavits in disproof and motion to dismiss made by the attorney accusing.

A. M. Heslip for petitioner.

By the COURT.—The charges of professional misconduct made against the defendant, Turner, having been satisfactorily disproved by affidavits on file, and the attorney by whom the charges were preferred having moved the court to dismiss the same, all proceedings in the case are hereby dismissed.

PEOPLE ex rel. LENEHAN, Respondents, v. THARP, Appellant.

No. 8146; December 19, 1881.

Elections—Chief of Police of San Francisco.—As a condition precedent to the issuance of a certificate of election to a chief of police of San Francisco, it is required that the board of election commissioners declare that such election has been had.

APPEAL from Superior Court, San Francisco.

Clark, Splivalo, McClure, Dwinell & Plaisance for appellant; Benham and Carter for respondents.

By the COURT.—The statute requires, as a condition precedent to the issuance of a certificate of election, the declaration of such election by the board of election commissioners. There was no such declaration by the board of election commissioners in this case. Besides, this court, previous to the last municipal election in the city and county of San

Francisco, determined that under the existing laws the chief of police was not one of the officers to be elected at that election.

Judgment reversed.

MORROW v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO.*

No. 7613; January 20, 1882.

Corporations—Liability of Stockholder—Constitution of 1849. The constitution of 1849 needed the aid of the act of 1850 (section 32) and the act of 1853 (section 16) in order to subject each member of a corporation to the paying of the debts of the company.

Corporations—Liability of Stockholder—Constitution of 1882. Section 3 of article 12 of the present constitution (1882), that provides for subjecting each member of a corporation to the paying of the company's debts, is self-executing and needs no legislation to give it practical effect; and is, like all other provisions of the instrument, mandatory.

Corporation—Charter, Subjection to Future Legislation.—A corporation organized "under general laws" as provided in a then prevailing constitution, which provided in the same connection that "all general laws pursuant to this instrument may be altered from time to time or repealed," is subject to appropriate enactments thereafter both constitutional and legislative.

Constitutional Law—Obligation of Contracts—Change of Remedy.—A legislative act giving creditors recourse to law, whereas their sole recourse theretofore was to equity, in proceeding against a stockholder, does not impair the obligation of contracts.

McGraw for petitioner; Neale for respondent.

McKINSTRY, J.—The return to the writ of certiorari shows that one Joseph Barron commenced an action in the justices' court of San Francisco to recover of petitioner, as stockholder in the "California Mutual Life Insurance Company," corporation, his alleged proportion of the indebtedness of the company upon an overdue policy; that petitioner, defendant in the action, demurred to and answered the com-

*For subsequent opinion in bank, see 64 Cal. 383, 1 Pac. 354.

plaint therein. The judgment was in favor of the defendant. The plaintiff appealed from the judgment to the superior court on questions of law, and on such appeal the superior court reversed the judgment of the justices' court and ordered a new trial of the action. The action was retried in the superior court and judgment rendered in favor of plaintiff for the sum of forty-four dollars and eighty cents.

It may be assumed that, unless the justice had jurisdiction of the subject matter of the action, the superior court had none to order a new trial, or to render any judgment except to reverse that of the justice.

The fourth article of the constitution of 1849 contained sections which read as follows:

"Sec. 32. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law."

"Sec. 36. Each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities."

In French v. Teschemaker, 24 Cal. 540, it was said that section 36, above cited, was not complete or self-executing, or, in other words, did not, within its own terms, provide a complete rule of conduct, and that such defect was not cured by the rule of the common law; that legislation was therefore necessary to give the section a reasonable and practicable application.

The thirty-second section of the act of 1850, "concerning corporations," provided: "Each stockholder of any corporation shall be individually and personally liable for a portion of all its debts and liabilities, proportioned to the amount of stock owned by him." And in section 16 of the act of 1853 it was enacted: "Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder; for the recovery of which joint and several actions may be instituted and prosecuted."

In French v. Teschemaker it was held that, although the act of 1853 omitted the definition of "proportion" contained in the act of 1850, yet the two acts combined contained what was omitted in the thirty-sixth section of article 4 of the con-

stitution, and whatever was needed to give the section of the constitution a practical operation.

Section 3 of article 12 of the present constitution is:

"Each stockholder of a corporation, or joint stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole amount of the subscribed capital stock or shares of the corporation or association. The directors or trustees of corporations or joint stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint stock association, during the term of office of such director or trustee."

It will be seen that the section of the present constitution more fully defines an exact liability on the part of the stockholders of all corporations than did the provisions of the acts of 1850 and 1853, referred to in French v. Teschemaker. It follows that it is self-executing and needs no legislation to give it practical operation. Like all other affirmative provisions of the constitution, it is mandatory. The primary liability of the stockholders of every corporation, thus specifically and clearly declared, may, of course, be enforced by an action at law, and legislation which should attempt to limit the liability, or to postpone it, or make it secondary to that of the corporation, would be unconstitutional and void.

The thirty-first section of article 4 of the constitution of 1849 reads:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

Treating the act of April 2, 1866, under which "The California Mutual Life Insurance Company" was organized (Stats. 1865–66, p. 752), as a general law relating to all insurance companies—and it has been so treated by counsel—it is subject to section 31, article 4, of the former constitution.

Assuming, as contended for, that the act last cited does not contemplate a direct action at law against a stockholder, but requires a proceeding in equity on the part of creditors which

shall first exhaust the guaranty fund in the act provided for, and that, as a consequence, a justice of the peace has no jurisdiction to try a cause involving such equities, it will hardly be denied that, under the former constitution, the act of 1866 might have been amended so as to provide for a direct proceeding at law for the recovery by a creditor of the corporation from a stockholder of a definite and proper proportion of the debt. The stockholder could not complain that such an amendment impaired the obligation of his contract, since he became a stockholder in view of a possible alteration in the law which might change the nature of his liability—a fortiori, which might change the remedy for its enforcement.

The thirty-first section of article 4 of the constitution of 1849 authorized the repeal of any general incorporation law. It also authorizes any alteration of such general law, which, if it had constituted a portion of the original law, would not have been violative of the constitution, state or federal. The last clause of the section would have no reason for its existence, if it should be construed as intending that the general law could be only altered, provided the alteration did not affect the rights of corporations or corporators. Those who formed corporations under a general law, passed in accordance with the constitution, agreed that the state should retain the right to change their duties and liabilities, to the extent that their duties and liabilities might at first have been fixed and imposed in the general law. They received from the local sovereign the grant of a franchise; a grant which is so far of the nature of a contract as that they could not be deprived of any vested rights acquired under it without their consent. But as they consented to alterations, at the option of the state, when they formed a corporation and accepted the grant, any rights they might acquire were conditional and subject to such alterations at the will of the state. Ordinarily, it is true, the very idea of a contract excludes a power on the part of one of the contracting parties to change its terms. But a grant by the state is a contract sub modo. It is a contract only to the extent that the citizen shall not be deprived of rights under it without his consent. But if his consent be given when he acquires the qualified right, we know no reason why he should not be held to have yielded it as fully as if he should subsequently agree to surrender a vested right.

Section 1 of article 12 of the present constitution reads: "Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this state concerning corporations, and all laws that may be hereafter passed, pursuant to this section, may be altered from time to time or repealed."

It will scarcely be contended that section 31 of article 4 of the former constitution should receive so narrow a construction as that the "general laws" therein mentioned could have been altered or repealed only by a legislature assembled under that constitution; and, as a consequence, that the section last quoted of the present constitution could not authorize an alteration of a general incorporation law (passed while the former organic law was in effect) by the present legislative bodies, but that any attempted alteration—if it in any degree affected the rights or liabilities of a corporation or its members—would be violative of a provision of the constitution of the United States: "No state shall pass any law impairing the obligation of contracts": Art. 1, sec. 10.

Nor can it be asserted with more than plausibility that section 31 of article 4 of the former constitution did not contemplate an alteration or repeal of a general incorporation law by a provision of a new state constitution. The present constitution of California is a substitute for that adopted in 1849, as amended in 1863, and our present state government a continuance of that established when the constitution of 1849 was adopted. The former constitution provided for its own entire revision through a movement initiated by the senate and assembly created by it. The legislative bodies of the new constitution are the successors of the old, with the same powers, except so far as their powers have been further limited by additional constitutional restrictions. The last clause of section 31 of article 4 of the former constitution was undoubtedly drawn with reference to the tenth section of article 1 of the constitution of the United States, and the judicial decisions under it—notably the case of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 519, 4 L. Ed. 630. Its primary purpose was to retain for the state the power to alter the terms of a grant of corporate rights; to relieve any such alteration of invalidity, as an impairment of the obligations of a contract. That learned commentator, Mr. Justice Cooley, has

assumed such to have been the purpose of similar provisions in state constitutions. "It is under the protection of the decision in the Dartmouth College case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the states to which they owe their corporate existence. Every privilege granted or right conferred—no matter by what means or on what pretense—being made inviolable by the constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation; and a clause of the federal constitution whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil. To guard against such calamities in the future, it is customary now for the people in framing their constitutions to forbid the granting of corporate powers, except subject to amendment and repeal; but the improvident grants of an early day are beyond their reach": Cooley's Constitutional Limitations, 4th ed., note p. 340.

By the Revised Statutes of Rhode Island it was provided, "all acts of incorporation hereafter granted may be amended or repealed at the will of the general assembly," etc. It was held that an amendment which imposed an additional liability upon a stockholder was valid: Gardner v. Hope Insurance Co., 9 R. I. 194, 11 Am. Rep. 238. In Massachusetts it has been decided that the right of the legislature to amend, alter, or repeal the charter of a railroad corporation—the right being reserved by the general statutes—includes authority to withdraw powers granted to the corporation, and to confer new powers upon it and require their exercise, and is independent of the assent of the corporation: Mayor etc. Worcester v. N. & W. Co., 109 Mass. 103.

It is obvious that whether the right to alter the terms and conditions upon which a franchise or corporate right is held be provided for in the charter of the corporation, or is reserved in a general law under which it is organized, or reserved in the state constitution, the result must be the same.

We have shown that the general law under which a corporation was organized prior to the adoption of the present constitution could be altered, without the renewed consent of the corporators, by the legislature convened under the former constitution, and that such law can also be altered by the legislature under the present constitution. It would seem to be syllogistic that an alteration may be made directly by the organic law which may be made by enactment of a legislature deriving its powers from the organic law. By section 3 of article 12 of the present constitution each stockholder in every corporation is made directly and primarily liable for a certain proportion of its debts contracted or incurred during the time he is a stockholder. If, by any general law, passed while section 31 of article 4 of the former constitution was in operation, the liability of a stockholder for the debts of the corporation was made contingent and secondary, and not direct and primary, the liability has been rendered certain, direct, and primary by section 3 of article 12 of the present constitution; and, from the nature of the liability now existing, it may be enforced by a common-law action. Section 31 of article 4 of the former constitution operated to make all general laws under which corporations might be formed subject to alterations by the state, whether declared in a subsequent law or constitution.

The proceedings in the superior court are affirmed.

CONCURRING OPINION.

As, in our opinion, the constitutional provision in question affected the remedy only, we concur in the judgment.

Ross, J.

McKee, J.

COTA, Appellant, v. JONES and Wife, Respondents.

No. 8009; January 20, 1882.

Superior Court's Jurisdiction—Breach of Confidence.—The constitution clothes the superior courts with jurisdiction of all cases where breach of confidence is shown.

Fraud.—In a Suit by a Cestui Que Trust Against a Trustee, a complaint that sets out fraud and asks accordingly for a restoration of property as the relief states facts sufficient to constitute a cause of action.

Estates of Decedents.—A Conveyance Fraudulently Obtained, in deference to which the probate court has distributed the grantor's share of the estate to the grantee, does not estop the grantor, proceeding without undue delay, to sue for a restoration, setting out the fraud in his complaint.

Fraud—Laches—Limitation of Actions.—There is no stale claim disclosed and the statute of limitations is no bar, if a plaintiff, in an action for relief from a fraud practiced upon her, discovered the fraud only within two months of bringing suit.

Fraud—Laches—Discovery by Counsel.—In a complaint setting out fraud and objected to as revealing delay in bringing the action, it is sufficient to refer to investigation by counsel as the means whereby the fraud was unearthed, when the plaintiff is unused to business, ignorant, and unacquainted with the language.

APPEAL from Superior Court, Santa Barbara County.

Packard & Stratton for appellant; Richards & Boyce for respondents.

McKEE, J.—After sustaining a demurrer to the complaint in this action, the court below dismissed the action, and from the judgment of dismissal comes this appeal.

Substantially, the complaint shows that the plaintiff and defendant Ramona Jones are sisters, and two of eight heirs at law of Juana Lugardo Malo, deceased; that the defendant D. W. Ap Jones is the husband of his codefendant Ramona, brother in law of the plaintiff, and administrator of the estate of the deceased Juana Lugardo; that the plaintiff, as an heir at law of the deceased, and entitled to an undivided one-eighth interest of the estate, was wholly ignorant of the condition of the estate, and of the value of her interest therein; and, being

ignorant, she placed implicit confidence in the defendants, and relied solely upon the representations which they made to her upon the subjects; that, for the purpose of cheating and defrauding her out of her share of the real and personal property of the deceased, they falsely and fraudulently represented to her that it was of little value, until they induced her to transfer her entire interest in the estate of her sister Ramona, through the medium of one Huse, to whom, at the request and under the direction of the defendants, she executed a conveyance of her interest, expressing a consideration of fifteen hundred dollars, and delivered it to the defendant, D. W. Ap Jones; that Huse, who paid no part of the consideration money, and to whom the conveyance was made but not delivered, executed and delivered to the defendants, pursuant to the arrangement and understanding between him and them, a conveyance of the property; and by virtue of the conveyances thus fraudulently obtained, the defendant claimed and received, on a distribution of the estate among the heirs at law, the full share of the plaintiff in the real and personal property of the estate, in value amounting to eight thousand dollars; that the defendants have been, since the date of the conveyance to Huse, in possession of her estate in the real property, which consists of two ranches, known as the Santa Rita and Purissima ranches in Santa Barbara county, taking to themselves the rents and profits of the same; that she has always been ignorant of the fraudulent practices by which the defendants obtained from her the conveyance of her property, until they were brought to her knowledge by the investigations of counsel, about two months before the commencement of the action. And she asks that the transaction be investigated, that the defendants be declared her trustees of all the real estate obtained by them under the fraudulent conveyances, and that they be compelled to convey the same back to her.

The grounds of demurrer upon which defendants rely are that the complaint does not state facts sufficient to constitute a cause of action, that the court has no jurisdiction of the subject matter, that the cause of action is barred by the statute of limitations, and that the complaint is ambiguous and uncertain.

The facts are sufficient to constitute a cause of action. The cause of action springs from fraud, and the object of the action is to charge the defendants, as trustees for the plaintiff of property obtained from her by fraud, and to compel them, as actors in a fraudulent transaction, to restore the fruits of their fraudulent conduct. "Covin, accident, and breach of confidence" are the oldest subjects of equity jurisdiction; and of those subjects original jurisdiction has been conferred upon the superior courts of the state by article 6, section 5 of the constitution. Therefore there is no question of the jurisdiction of the lower court over the subject matter of the action.

Being an action for relief on the ground of fraud, the plaintiff is not estopped by the fact that the defendants claimed and received, in the distribution of the estate, the share of the plaintiff in the estate by virtue of the conveyance obtained from her by fraud. It was incumbent on the probate court in making partition or distribution of the estate to assign the share of the plaintiff to the person holding her conveyance (Code Civ. Proc., sec. 1678); but that did not clothe the assignee with a new title to the property of the plaintiff if the conveyance under which it was assigned to him had been obtained from the plaintiff by fraud; nor did it, in any way, affect the jurisdiction of a court in equity to grant relief against the fraudulent conduct of the assignee in obtaining the title to the property. A person injured by the fraud of another is not affected by his subsequent acts in obtaining, or enjoying, possession of the property acquired by the fraud, unless he has allowed his claim for relief to become stale or to be barred by the statute of limitations.

But in the case in hand the facts do not disclose a stale claim; and the cause of action is not barred by the statute of limitations, if the plaintiff was ignorant of the fraud which had been practiced upon her, and did not discover it until two months before the commencement of the action: Code Civ. Proc., subd. 4, sec. 338.

On this subject of discovery, however, it is urged that the complaint does not show how the alleged discovery was made. The allegation is "that the fraud perpetrated by the defendants was brought to her knowledge by the investigation of counsel."

That is claimed to be insufficient, and it is insisted that the pleading should show "what the discovery was, how it was made, and why it was not made sooner." But it does sufficiently appear by the complaint that the plaintiff discovered, only two months before the commencement of the action, that the defendants had, by false and fraudulent practices, obtained from her for fifteen hundred dollars a conveyance of property of the value of eight thousand dollars, and that she did not know of the fraud by which it had been accomplished until the investigation of counsel revealed it, because she was ignorant and unacquainted with business, and could neither read nor speak the English language, and could not ascertain for herself anything upon the subject, and was wholly ignorant in relation to it until she ascertained it from counsel.

We think as a pleading the complaint is sufficient: Moore v. Moore, 6 Pac. C. L. J. 444.

Judgment reversed, with direction to the court below to overrule the demurrer.

We concur: McKinstry, J.; Ross, J.

UPHAM, Respondent, v. HOSKING, Appellant.*

No. 6974; April 29, 1882.

State Lands—Two Mile Limit—Evidence.—One attempting to defeat a patent on the ground that the land was within two miles of a town must show by affirmative evidence that at the time of the issue there was a town within the two miles.

State Lands—Two Mile Limit—Curative Act.—In regard to lands purchased from the state prior to 1872, the objection that they were within two miles of town would, provided the requirements of law were complied with in other respects, have no force, in view of the curative act of March 27th of that year.

Ferry Franchise—Nonuser—Forfeiture.—Under an act granting a ferry franchise and providing for forfeiture in default of the establishing of the ferry by the grantee within a time named, a failure to establish the ferry within that time would ipso facto operate as a forfeiture and need no judicial proceeding to declare the fact and effect.

*For subsequent opinion in bank, see 62 Cal. 250.

APPEAL from Seventh District Court, Solano County.

Lamont, Brooks and Levison for appellant; J. F. Wendell for respondent.

By the COURT.—Plaintiff brought an action of ejectment to recover certain lands described in his complaint.

Upon the land sued for there was a wharf, built under a franchise granted by the state to one Collins, under whom defendant derived title. Judgment passed for plaintiff; there was a motion for a new trial, which was denied, and this appeal is from the judgment as well as from the order denying a new trial.

Plaintiff introduced in evidence a patent from the state, bearing date May 18, 1872, and also a deed from one Brown to him, dated February 29, 1872.

The evidence and admissions of the parties clearly show that all of the lands in controversy are within the boundaries of the description contained in the patent, except a strip seventeen by one hundred and thirty feet; as to that strip, it was admitted that the title was in Brown, who conveyed the same to plaintiff, unless the strip was excluded by an exception contained in the deed of conveyance. The finding of the court is "that the plaintiff is, and was at the commencement of this suit, and at all the times alleged in his complaint, the owner in fee simple and entitled to the possession of all and singular the premises described in his complaint"; which necessarily includes a finding that the strip mentioned was not excluded by the exception in the deed. There is nothing in the evidence to satisfy us that the finding is incorrect.

The plaintiff's title under the patent is attacked upon the ground that the land lies within two miles of the town of Collinsville and was therefore not subject to sale. There are two answers to this objection, the first of which is, that it appears by the fourteenth finding of the court "that the said land included in said location and patent is not, and never has been, situated within two miles of any town whatever." If the defendant attempted to defeat the patent by showing that the land described therein was within two miles of a town, and

therefore reserved from sale, it was his duty to do so by affirmative and satisfactory evidence that there was a town within two miles of the land. This he failed to do, and we think the court was justified by the evidence in finding that there was no town within two miles.

But if the evidence satisfactorily showed that such a town existed, we think it would not have availed the defendant in view of the curative act of March 27, 1872. On this point it will be sufficient for us to refer to the late decision of this court in the case of Rowell v. Perkins, 56 Cal. 226, where the act above referred to is fully considered by the court, and we concur in the views therein expressed by Mr. Justice McKinstry.

The remaining question in the case is whether the defendant had the title under a statute of this state granting to one C. J. Collins, his associates and assigns, for the term of twenty years, from May 6, 1861, the right to establish a ferry across the upper end of Suisun bay, from Point Collberg, in Solano county, to a place called New York, in Contra Costa county. By section 4 of the act granting the franchise it is provided that "if the said parties shall fail to commence and complete the said wharf and establish the said ferry within the time prescribed in this act (six months), or in any other manner violate its provisions, then all the rights granted become forfeited to the state."

The finding is "that neither said Collins, his associates, nor assigns ever established or put in operation any ferry of any kind between the points named in the said act," and this finding is fully sustained by the evidence. There was therefore a forfeiture of all rights that ever existed under the act of 1861, and it was within the power of the state to sell the land to the plaintiff. The failure to build the wharf and establish the ferry operated a forfeiture under the act, and no judicial proceeding was necessary to declare the forfeiture: Borland v. Lewis, 43 Cal. 569; Oakland R. R. Co. v. Oakland etc. R. R. Co., 45 Cal. 365, 13 Am. Rep. 181.

Certain other acts of the legislature were offered in evidence by the plaintiff, but for what purpose is not very clear to us. Objection was made to their admissibility by the defendant, and it is said that the court did not pass upon the question.

But no right was claimed under them by either party, and, in the view we have taken of the case, they were immaterial.

Judgment and order affirmed.

SAVINGS AND LOAN SOCIETY, Respondent, v. HORTON et al., Appellants.

No. 7552; May 30, 1882.

Appeal—Judgment in Foreclosure—Defaulting Defendants—Presumption of Correctness.—On appeal from a judgment of foreclosure after all the defendants had made default, where the case is presented on the judgment-roll simply, and the point urged is the excessive amount of the judgment, it must be presumed that the trial court, having had the evidence before it, was correct in its findings, until error is shown in the manner provided by law.

APPEAL from Superior Court, San Francisco.

Chase and Williams for appellants; Drown for respondent.

By the COURT.—This action is for the foreclosure of a mortgage executed by Alonzo E. Horton. All the defendants made default. The appeal is from the judgment. The only appellant is Levi Chase, who was made a party defendant as claiming to have some estate or interest in the mortgaged property, or lien or demand on it, or some part of it, which claim was alleged in the complaint to be subject and inferior to the lien of the plaintiff's mortgage.

The case comes before us on the judgment-roll. It is urged that the judgment is for too large an amount. The amount for which judgment was to be rendered was peculiarly a matter for the lower court to determine. On what principles or data it proceeded nowhere appears in the record. This the court below was to determine on the evidence before it. What that evidence was, it is not made to appear to us by any statement or bill of exceptions, or in any mode allowed by law. We cannot review the action of the court below on the record before us. We must presume it to be correct until error is shown in the manner prescribed by law. If the

appellant was aggrieved by the action of the lower court he might, perhaps, have obtained relief by timely motion in that forum. We find no error in the record, and the judgment is affirmed.

SAVAGE, Respondent, v. SWEENEY, Appellant.*

No. 7084; June 28, 1882.

Contract to Furnish Girders of "Best Quality"—Construction.—A contract for the manufacture and delivery of "girders" of the best quality of pig iron, "to be put in place within forty-six days," must, considering the time limit, be held to mean the best quality to be found in the state, rather than in all the world.

Appeal—Order for New Trial.—When the Trial Court Determines it has erred in its findings and orders a new trial accordingly, the order is not to be disturbed if the error was the finding of a material fact without sufficient evidence, or contrary to evidence, or on a conflict of evidence.

APPEAL from Nineteenth District Court, San Francisco.

Jarboe & Harrison for appellant; R. R. Provines for respondent.

McKEE, J.—Action to recover the amounts claimed to be due for work done and materials furnished in the alleged performance of two contracts.

The case was tried without a jury, and the court found, (1) that the plaintiff had performed his first contract for which he had been paid, except the sum of two hundred and ten dollars, which was due and unpaid at the commencement of the action; (2) that the plaintiff had not performed his second contract, except in part, for which he had been paid three thousand five hundred dollars, and as there had not been full performance, there was nothing due on the contract. Judgment was accordingly entered in favor of the plaintiff, for the balance due upon the first contract; but afterward the court below, on a motion for a new trial, upon a settled state-

*For subsequent opinion in bank, see 63 Cal. 340.

ment of the case, set aside its judgment and finding, and ordered a new trial, from which the defendant appealed.

The record of the case, upon which the new trial was ordered, shows that, on October 17, 1873, the plaintiff, by contract in writing, undertook to make and furnish the defendant, within forty-six days after the date of the contract, twelve cast-iron columns, twelve molded ring-caps and twenty-four cast-iron girders for the first story of the Hall of Records of the New City Hall, in course of construction in the city and county of San Francisco, for which the defendant agreed to pay eight thousand three hundred dollars, in installments according to the terms and conditions of the contract.

Plaintiff, in performance of the contract, furnished the columns and molded iron-caps, and they were accepted and used in the building; he also furnished on the ground twenty-four cast-iron girders, but they were not accepted, for the reason assigned that "they were not of the best quality of pig iron." The court found that they were not of the best quality of pig iron and were properly rejected; but the finding does not appear to have been sustained by the evidence. For the record shows that the girders furnished were made of the best quality of iron obtainable in the San Francisco market; and there is no evidence to the contrary, or that a better quality could have been obtained elsewhere within the state.

Performance by the best quality of iron obtainable in San Francisco market, it is claimed, was not performance according to the contract, because the contract required the best quality of pig iron without reference to place; and if the best was not obtainable at the place where the contract was made, it was the duty of the contractor to get it elsewhere. But, as the contracting parties stipulated for the manufacture and delivery of the girders so as to be put in place within forty-six days after the date of the contract, performance would have been impossible if they had to go outside of the state for materials necessary for their construction. Considering the circumstances under which the contract was made, and the relation of the contracting parties to the subject matter of the contract, we think it was manifestly the intention of the parties that the girders should be made of the best quality of

pig iron obtainable in the markets of the state. The plaintiff was not bound to procure any other; and as the record shows that he performed his work of the best quality of iron obtainable in the market, it should have been accepted.

Where one or two contracting parties perform work according to contract, it is the duty of the other to accept and pay for it.

Having determined that the fact found was contrary to the evidence, or on a conflict of evidence, the court below acted properly in setting aside the judgment and finding, and ordering a new trial. This court never disturbs such an order where it appears to have been made on the ground that a material fact has been found without sufficient evidence, or contrary to evidence, or on a conflict of evidence: Oullahan v. Starbuck, 21 Cal. 413; Hathaway v. Ryan, 35 Cal. 188; Witherby v. Thomas, 55 Cal. 9; People v. Anthony, 56 Cal. 397.

Order affirmed.

McKINSTRY, J.—I concur in the judgment. The specification referred to in the contract commences: "All the cast-iron work to be made of the best quality of pig iron." If iron in pigs is graded or classified in the trade—the classes being generally recognized among dealers, foundrymen, and other workers in iron—I think the specification called for the first or best class, independent of the circumstance that there happened to be none of that class in this market when the contract was entered into or the work done. There seems to have been no evidence as to such recognized classification, and while the evidence on the part of the plaintiff is not very satisfactory, yet the testimony of at least one of his witnesses tended to prove that the best quality of iron—that "sought for by all machine shops and foundries for good work"—was used in the rejected castings. Under the circumstances, as it seems to me, the interests of justice will be subserved by a new trial, and I am not disposed to interfere with the action of the learned judge who saw and heard the witnesses.

ROSS, J.—I concur in the judgment and in the views expressed by Mr. Justice McKinstry.

WEILL, Respondent, v. BENT et al., Appellants.

No. 8294; June 28, 1882.

Default.—An Affidavit of Service of Summons by a person other than the sheriff should state that such person was over the age of eighteen years at the time of the service, else a judgment rendered thereon by default will be reversed on appeal.[1]

APPEAL from Superior Court, Los Angeles County.

F. H. Howard for appellants; Glassell, Smith & Wicks for respondent.

By the COURT.—This is an appeal by defendant Palomeres from a default judgment. The affidavit of service of summons does not show that affiant was over the age of eighteen years at the time of the service. On authority of Maynard v. McCrellish, 57 Cal. 355, and Howard v. Galloway, 8 Pac. C. L. J. 1060, judgment is reversed and cause remanded.

DE GUTIERREZ, Appellant, v. BRINKERHOFF et al., Respondents.*

No. 7550; July 26, 1882.

Appeal—Order for New Trial—Conflict of Evidence.—The appellate court should not reverse an order for a new trial if there was before the trial court a substantial conflict of evidence on any material issue.

Appeal—Order for New Trial—Conflict of Evidence—"Fraud" or Improvidence.—The trial court having found actual fraud from

[1] **Cited,** by the inaccurate title "Weise v. Bennett," in Lyons v. Cunningham, 66 Cal. 43, 4 Pac. 938, as authority for saying that where service of summons was effected otherwise than by the sheriff, proof of service by the person serving is a condition precedent to a judgment by default; that in the absence of such proof the court is without jurisdiction of the defendant.

*For subsequent opinion in bank, see post, p. 000, 1 Pac. 482.

the evidence which was conflicting, its order thereafter for a new trial ought not to be disturbed, since the fraud imputed might, on reconsideration, turn out to have been mere improvidence.

APPEAL from Superior Court, San Francisco.

Irving, Benham and Packard for appellant; Winans & Belknap for respondents.

MYRICK, J.—Upon the trial of this case in the district court, the court, in refusing defendants' motion for a nonsuit, said:

"So far as the fraud in this case is concerned, it is far from being a strong case of fraud, and I should be inclined to hold that there was no fraud were it not for the fiduciary relations of the parties, taken in connection with the relation that Conway held as an officer of the United States government. . . . . I think there is just about enough doubt in this case to hear the evidence on the other side. I should suppose that parties would desire, where there is an imputation against their characters of this kind, to have an opportunity to clear it up fully if they can. I deny the motion for a nonsuit for this reason."

Subsequently, the court found that the defendants Brinkerhoff and Scollan willfully, falsely, fraudulently, and with the intent to cheat and defraud Octaviano Gutierrez out of the land in question, induced him to execute a deed thereof; and rendered judgment for plaintiff.

A motion for new trial was heard before the superior court, successor of the district court, and the superior court, in granting the motion, held that there was no evidence showing actual fraud on the part of the defendants, Hutchinson, Conway, and Brinkerhoff, or either of them.

The motion for nonsuit should have been granted. The testimony fails to show that such relations existed between the parties as prevented them from making the transactions complained of. Possibly the transactions may have been improvident on the part of Octaviano; but the testimony fails to show that he was overreached through actual fraud.

Order affirmed.

SHARPSTEIN, J.—I concur in the affirmance of the order granting the motion for a new trial on the ground that this court will not reverse such an order if there be a substantial conflict in the evidence upon any material issue in the case. And in this case it appears to me that upon the question of fraud the evidence was conflicting, and that the court, having found upon such evidence that there was actual fraud, its subsequent order granting a new trial cannot be disturbed.

I concur: McKinstry, J.

NICHOLS, Appellant, v. DUNPHY, Respondent.

No. 8356; September 29, 1882.

New Trial—Setting Aside Order for by Trial Court.—If a motion for a new trial is realized as having been granted inadvertently or prematurely the trial court may set aside its order, but not otherwise.

New Trial.—The Right of Appeal from an Order Granting a new trial may not be kept alive by the court's vacating its order, once duly made, and thereafter virtually reinstating it.

APPEAL from Superior Court, Santa Clara County.

J. C. Black for appellant; D. L. Delmas for respondent.

By the COURT.—On the 6th of July, 1878, a judgment was entered against Carmen Dunphy, from which, and from an order denying her motion for a new trial, she appealed to this court on the 27th of March, 1882.

The respondent now moves in this court to have the appeals from both the judgment and order denying the motion for a new trial dismissed, on the ground that neither of said appeals was taken within the time prescribed by law for taking such appeals. It is conceded that the appeal from the judgment was not. But it is insisted on behalf of appellant that the appeal from the order denying her motion for a new trial was taken in time. For the purpose of determining whether it was or not, it will be necessary to ascertain at what time said order was made.

It appears by the record that the appellant filed and served a notice of her intention to move for a new trial on the 16th of July, 1878, and that the bill of exceptions upon which said motion was based was settled and filed on the 23d of August, 1878.

The motion was submitted and denied on the 12th of March, 1880.

On the 17th of April, 1880, the court made and entered an order in the following words, to wit:

"Upon motion it is ordered that the order heretofore made denying the motion for a new trial herein, be and the same hereby is set aside, and the said motion now remains undisposed of, upon the ground that the judgment in this cause upon the defendant William Dunphy's appeal reverses the whole judgment as to both defendants, and counsel for plaintiff except to the ruling of the court, and cause is ordered on trial calendar for proceedings."

Afterward, on the 27th of January, 1882, the court made and entered another order denying said motion for a new trial, and it is from this last order that this appeal is taken, and if the court had the power to set aside its first order denying said motion for a new trial, and to proceed de novo upon said motion, said appeal was taken in time. Otherwise not.

The question, as we view it, is not a new one in this court.

In Coombs v. Hibberd, 43 Cal. 452, it was held that when an application for a new trial had been made in due form upon a settled statement, and the court had passed on the motion, the court could not afterward vacate the order and pass upon the motion again. And the same thing had been previously held in Waggenheim v. Hook, 35 Cal. 216. The reasoning upon which those decisions were based commends itself to our judgment.

It is doubtless true that where it appears that the motion for a new trial was inadvertently or prematurely heard, the court might set aside its order, and in some cases it would be its duty to do so. But we are unable to discover any such ground for upholding the action of the court in this case. It certainly does not appear that the attorney who consented to the submission of the motion in the first instance had no authority to do so, and in the absence of anything appearing to the contrary, we will presume that he had such authority.

But it does not appear that the motion to set aside was based upon that ground, and the court expressly bases its action upon another and, in our judgment, wholly insufficient ground.

Upon the authority of the cases above cited, we must treat this appeal as if it had been taken from the order of March 13, 1880, and in that light, the appeal unquestionably was taken too late.

Motion to dismiss granted.

PIERCE, Appellant, v. HYDE and GOVE, Respondents.

No. 8610; November 2, 1882.

Suretyship—Mortgage for Debt of One of Two Tenants in Common.—Where A and B, owners in common, join in a conveyance to C by way of collateral for B's sole debt, A becomes a surety; and if thereafter full tender of the secured debt is made, C in the meantime having taken a sheriff's certificate in execution of a judgment in his favor against B for another debt, the rights of the several parties cannot be adjudicated, in the absence of evidence tending to show whose money was tendered; since, if it was A's, A would be subrogated to C's position against B in respect to the first transaction and have a lien on B's interest in the land superior to C's lien under the execution sale.

APPEAL from Superior Court, Santa Barbara County.

George A. Nourse for appellant; J. C. Bates for respondents.

By the COURT.—It does not appear from the pleadings or from the evidence in this case how much of the money offered to be paid on behalf of the defendants to plaintiff was on behalf of the defendant Gove, nor how much on behalf of the defendant Hyde. If the money was tendered on behalf of Hyde, doubtless plaintiff would be entitled to the benefit of his purchase under the execution sale; and if the money, or any part of it, was tendered on behalf of the defendant Gove, she would be entitled to be subrogated to plaintiff's position as against Hyde, and have a lien, superior to the execution sale, on the Hyde share of the land, to secure her for the

money paid by her to relieve her interest from Hyde's debt. In either event plaintiff would be entitled to retain the sheriff's certificate and any title he might have acquired thereby, to the extent of any surplus of the Hyde interest above the holding of the defendant Gove, harmless of Hyde's debt.

If the decree for the conveyance by plaintiff had been confined to the interest of the defendant Gove, the plaintiff could not have objected; but as the case is presented to us, the decree as it is would deprive plaintiff of a legal right. From the uncertainty apparent as well in the pleadings as in the findings, it is impossible for us to direct any particular judgment to be entered. The judgment is therefore reversed and the cause is remanded for a new trial, with instructions that the parties may be permitted to amend their pleadings, if so advised. In the absence of an ascertainment as to whose money was offered to be paid, we do not see how a judgment can be entered which shall definitely protect the interests of the defendant Gove.

It may be added that the commercial value of the land is not for consideration. The plaintiff, in causing Hyde's interest to be sold on the execution, had the right to place his own estimates of value, and to determine for himself whether there would be an ultimate balance in his favor.

DEAN, Petitioner, v. SUPERIOR COURT OF SANTA BARBARA COUNTY, Respondent.*

No. 8412; December 14, 1882.

Administrators—Decree of Settlement—Setting Aside—Appeal. The action of the superior court in declaring void a decree of settlement of account, distribution and discharge, and in setting aside the decree, is not subject to appeal but writ of review.

Administrators—Final Account—Notice.—If an executor gives notice of the filing of his final account and of a day fixed for its settlement, this would mean filed for final settlement, and would mislead nobody; so, too, a notice given that with such final account a petition for distribution is filed; this would mean for final distribution.

*For subsequent opinion in bank, see 63 Cal. 473.

Canfield for petitioner; Stratton for respondent.

MYRICK, J.—This is a proceeding, by writ of review, to review the action of the superior court in declaring a decree of settlement of account, distribution and discharge to be void, and in setting the decree aside.

The superior court, after hearing the evidence, found that the executor rendered a final account for settlement, and at the same time filed a petition for the distribution of the estate; that the final account was for a final settlement, and the petition for distribution was for a final distribution of the estate; that the record shows that the notice of the settlement of the account did not state that the account was for a final settlement or that the petition was for a final distribution; and, as conclusion of law, the court found the decree void. The findings contain nothing as to the facts not appearing in the record, upon which it was claimed that the decree should have been set aside; and although the court subsequently heard evidence upon such alleged facts, and in the recitals of the decree stated that the matters alleged in the petition were true, yet it does not appear that in the settlement of the account the court was imposed upon by false testimony; the court, in the proceedings subsequent to the finding that the decree was void, seems to have heard the case and determined it upon the idea that there was no decree of settlement, distribution or discharge.

The notice for settlement and distribution referred to in the findings reads: "Notice is hereby given that E. W. Dean, executor of the estate of Horace W. Dean, deceased, having filed in this court his final account and petition for distribution," etc., naming the time and place of hearing. The section under which the proceedings were had, section 1694, Code of Civil Procedure, reads: If the account rendered for settlement "be for a final settlement, and a petition for the final distribution of the estate be filed with said accounts, the notice of the settlement must state those facts," etc. The objection to the notice, and hence to the decree based thereon, seems to be that the notice did not state that the account was rendered for a final settlement, and that the petition filed was for a

final distribution. We think the objection is too critical. The notice did state that a final account had been filed, and that there was a petition for distribution. We think that in the orderly proceedings for the settlement of an estate, when notice is given that a final account has been filed, and of the day fixed for its settlement, notice is given that it is filed for final settlement, and no one would be misled; and when notice is given that with such final account there is filed a petition for distribution, notice is given that it is for a final distribution.

We think the court erred in its conclusions of law as to the validity of the decree; therefore the order adjudging it to be void is annulled. We express no opinion as to any other branch of the case, except to say that the order complained of is not an appealable order (Code Civ. Proc., sec. 963, subd. 3), and the writ of review is the appropriate remedy.

We concur: Sharpstein, J.; Thornton, J.

PRESTON et al., Respondents, v. HOOD et al., Appellants.*

No. 7547; December 15, 1882.

Contract—Undertaking to Prevent Attachment.—In an action on an undertaking given to prevent the levy of a writ of attachment the plaintiff must allege and prove the consideration for which the undertaking was executed.

Contract—Undertaking to Prevent Attachment.—In an action on an undertaking given to prevent the levy of a writ of attachment, judgment for the plaintiff is error when it appears by the pleadings and proof that actually a levy had been made and plaintiff had released it.

APPEAL from Superior Court, San Francisco.

Splivalo, Moore & Moore for appellants; Van Dyke & Power for respondents.

*For subsequent opinion in bank, see 64 Cal. 405, 1 Pac. 487.

ROSS, J.—This is an action on an undertaking given to prevent the levy of a writ of attachment. In such cases it is well settled that the plaintiff must allege and prove the consideration for which the undertaking was executed: Coburn v. Pearson, 57 Cal. 306, and cases there cited. While the complaint in the present case counts on the execution of an undertaking to prevent the levy of the writ, there is neither averment, finding, nor proof that the writ was not levied because of the undertaking, but, on the contrary, averment, finding, and proof to the effect that upon the execution and delivery of the undertaking, the sheriff released property which had been previously levied on. But the undertaking sued on was not given for the release of any property. Perhaps the defendants would not have executed an undertaking for that purpose. Whether they would or not, they did not. Their undertaking was given under section 556 of the Code of Civil Procedure to prevent the levy of the writ. Other sections, to wit, 554 and 555 of the same code, relate to the giving of an undertaking for the purpose of procuring the release of property already levied on.

Judgment and order reversed, and cause remanded.

We concur: McKinstry, J.; McKee, J.

DYER, Respondent, v. HUDSON et al., Appellants.*

No. 7256; December 15, 1882.

Street Law—Contract for Macadamizing—Premature.—The power of a board of supervisors to award a contract for macadamizing is largely controlled by local conditions at the time; it follows that such a contract cannot be awarded before completion of the grading.

Street Law—Macadamizing—Rights of Owners to Do the Work. The power of a board of supervisors to award a contract for macadamizing can be exercised only in such a manner as may not deprive the property owners of their statutory right to do the work themselves, the enjoyment of which right would be impossible if such award should be made before completion of the grading.

*For subsequent opinion, see 65 Cal. 374, 4 Pac. 231.

APPEAL from Superior Court, San Francisco.

L. H. Whittemore for appellants; D. M. Wood for respondent.

By the COURT.—The alleged error of the court below in holding an order extending the time for completing the contract, made after the expiration of the period originally fixed, to be valid, is not specified in the statement on motion for a new trial. The point decided in Beveridge v. Livingstone, 54 Cal. 54, will not be considered on this appeal: Code Civ. Proc., sec. 659, subd. 3.

But the record before us presents the point that the time for completing the contract for grading had not expired, nor was the grading in fact completed, either when the macadam contract was awarded or when the macadamizing should have been finished according to the contract as awarded.

The power of the board of supervisors to let a contract for macadamizing must be determined by the condition of things when such contract is awarded. The time for doing the work may be extended by the board, but the board may not anticipate the extension when the original award is made. The law supposes the board to intend that the contractor shall perform his work within the time fixed by his contract. In the case before us the advertisement for sealed proposals contained a notice that the macadamizing was to be done within sixty days after the contract was signed. The law required the work to be commenced within fifteen days after the award. By section 6 of the act of April 1, 1872 (Stats. 1871–72, p. 804), owners of property facing the improvement may elect, "within five days after the first publication of the award," to do the work. It is apparent that, if the board can award a contract for macadamizing before the street is graded, the property owners may be deprived of the right, secured by the statute, of doing the work themselves, and the power can only be employed in such manner as cannot deprive the property owners of the statutory right.

Judgment and order reversed, and cause remanded for a new trial.

SOUTHERN PACIFIC RAILROAD CO., Appellant, v. WHITE et al., Respondents.

No. 8532; January 2, 1883.

Judgment by Default—Setting Aside—Discretion.—An order setting aside a judgment by default will not be disturbed on appeal, unless there is a showing made of an abuse of discretion.

APPEAL from Superior Court, Los Angeles County.

Glassell & Smith for appellant; Brunson & Wells for respondents.

By the COURT.—In this case, which was ejectment, there was judgment by default for plaintiff against three defendants, who moved to set aside the judgment. The court granted the motion, on paying costs of motion and entry of judgment. From this order plaintiff appealed.

We have examined the affidavits on which the court set aside the judgment, and find no abuse of discretion which would warrant this court in interfering with the order vacating the judgment. This court only interferes with such orders when there is a manifest abuse of discretion.

Order affirmed.

BUTTE COUNTY, Respondent, v. BOYDSTUN et al., Appellants.

No. 8433; January 17, 1883.

Eminent Domain—Proceedings by County for Highway.—Provided it shows it has fully complied with the requirements of the statute under which private property may be taken for public uses, a county may institute proceedings to condemn land for purposes of a highway.

Eminent Domain—Elements of Damages—Benefits.—Private property cannot be taken from its owner even for a public use unless he is given just compensation; and this consists of the whole value of the land taken and the damage resulting to the rest of the land,

injuriously affected by the taking, less the amount of benefits accruing to the owner by reason of the improvement.

Eminent Domain—Damages—Cost of Fencing.—In assessing damage to land, not taken but off which land is taken, in condemnation proceedings for a highway, one of the matters to be considered is increased necessary outlay for building fences; and it is error to exclude evidence bearing upon that consideration.

APPEAL from Superior Court, Butte County.

Reardon & Freer for appellants; Gale & Lusk for respondent.

McKEE, J.—This was a proceeding to condemn a strip of land belonging to the appellant for a road in the county of Butte.

Mainly, two questions have been argued and submitted for consideration, namely: 1. Whether the proceeding has been properly brought in the name of the county; 2. Whether the appellant's land has been appropriated by a proper judgment of condemnation.

A county is a public corporation, endowed with capacity to acquire real property within its limits for roads and highways, etc.: Sec. 360, Civ. Code. It is also an integral part of the state, and entitled, as an agent of the state, to the control and management of the roads and highways within its jurisdiction. It is, therefore, a person in charge of a public use, and may exercise the right of eminent domain in behalf of the use: Civ. Code, sec. 1001. But it cannot exercise the right except in the manner provided by title 7, Code of Civil Procedure. Like any other condemning party, it is bound to show that the requirements of the statute which permits it to take private property for public use have been fully complied with. Hence it must, in any proceeding initiated by it for the purpose, show affirmatively that the property which it proposes to take is to be applied to a public use; that it is necessary to take it for that purpose, and that the compensation to which the owner of the property is entitled has been ascertained and assessed according to law. And each of these things must affirmatively appear in the record of the proceedings to have been found as facts by the verdict of a jury or the finding of the court, and to have been confirmed by the judgment of the

court: Secs. 1241, 1251, 1252, supra. If not so found and adjudged, the proceeding will be void. For private property cannot be taken from an owner against his consent, except for a public use, after just compensation for it has been ascertained, assessed and adjudged, and is ready to be paid: Sec. 1253, supra.

Such compensation consists of the whole value of the property to be taken and the damages which may result to the remainder of the land injuriously affected by reason of the taking, less the amount of any benefit which the proposed improvement may be to the owner. What such damages may be, will, of course, depend upon the circumstances of each case. But, under all circumstances, the owner is entitled to the fair market value of the land proposed to be taken, to be estimated at the commencement of the proceeding to condemn (sec. 1249, supra), and, in addition, to the remainder of any damages for the consequential injury to the remaining portion of his land after deducting benefits.

In ascertaining the amount of such damages all the circumstances which naturally injure the property of the owner, in consequence of taking part of it for a public use, should be taken into consideration—such as depreciation in value, difficulty of access, difficulty of carrying on business, danger of fire, and increased necessary expenses in the way of building fences, and the like. Injuries, speculative and remote, should, of course, be excluded: Cooley's Constitutional Limitations, 566.

Applying these principles to the proceeding under consideration, we think the appellant was entitled to prove, as an element of damages, that the proposed taking of a portion of his land for public use would impose upon him the necessity of fencing the remaining portion of his land. If that necessity resulted from the taking, it would be an injury for which he would be entitled to damages, and the ruling of the court in excluding the evidence was erroneous: Moutom v. Scott, 1 Penn. (S. C.) 503; Sacramento v. Moffat, 6 Cal. 74. But the entire proceeding is insufficient for the purpose of condemnation. By the record it appears that the case was heard and determined by the court without a jury, and the court made and filed a finding of facts, which is not in the record. It has stipulated, however, that the finding sustains the ma-

terial allegations of the complaint, and upon it, "as conclusions of law, the court finds: That the opening of said private road and the condemnation of said land belonging to said R. W. Boydstun, and herein sought to be condemned, is absolutely necessary for the purpose of opening said road, and that said road should be laid out and opened, and said land condemned for such purpose upon the payment to said R. W. Boydstun, according to law, the sum of one hundred and fifty dollars, and that each party hereto should pay his own costs. Judgment is hereby ordered accordingly."

But while the complaint contains a description of the location, general route and termini of the proposed road, and of the several parcels of land proposed to be taken, and the names of the owners, it contains no allegations of the right of the plaintiff to condemn, as required by sections 1241–1244, Code of Civil Procedure, or of the value of the lands, or of the sum of the compensation to which the owners are entitled. In the absence from the complaint of any allegations of such material facts, a finding "which sustains the material allegations of the complaint" is, therefore, wholly insufficient (Ladd v. Tully, 51 Cal. 277), and does not respond to the issues made in the proceeding. There was, therefore, no finding and no judgment of a necessity to take the appellant's land for the use of the public, no finding and no judgment that the land was to be applied to a public use, and that the compensation to which the owner was entitled had been ascertained and assessed according to the requirements of the law. A finding or judgment that the land sought to be condemned is necessary for the purpose of opening the road is not a finding or judgment that it is necessary for a public use. "A finding," says the supreme court of Michigan in Mansfield v. Clark, 23 Mich. 519, "that the taking is needful to the proposed enterprise is not the same as a finding that it is for the use and benefit of the public. The report of the jury or commissioners must distinctly cover this point in every case; and they cannot properly make one which will warrant the taking of the land, unless satisfied not only that the particular land is needed for the construction of the work, but also that the work itself is one of public importance": See, also, Rensselaer v. Davis, 43 N. Y. 137; Grand Rapids v. Van Driele, 24 Mich. 410.

Until there is such a finding and judgment rendered in a proper proceeding, under the code, there can be no appropriation; and every step in the proceeding must be taken strictly according to law. It is well settled that whenever the property of an individual is to be devested by proceedings against his will, there must be a strict compliance with all the provisions of the law which are made for his protection and benefit. Those provisions must be regarded as in the nature of conditions precedent, which must not only be complied with before the property owner is disturbed, but the party claiming authority under the adverse proceeding must affirmatively show such compliance: Cooley's Constitutional Limitations, 528.

Judgment and order reversed.

We concur in the judgment: Ross, J.; McKinstry, J.

SWEENEY & CO., Respondents, v. SUTRO & CO., Appellants.

No. 7446; January 26, 1883.

Warrant—Purchaser Without Notice.—When a Writ of Mandate commands a county officer to issue a warrant to a person named in it "or his attorney," and thereupon the warrant is issued to the attorney of that person, if the attorney afterward sells the warrant to one who takes for value and in good faith, the purchaser has a good title.

APPEAL from Superior Court, San Francisco.

E. J. Moore for appellants; J. B. Hart for respondents.

THORNTON, J.—The action was brought to recover of defendants a warrant or audited account, issued by the auditor of the city and county of San Francisco, or its value. It appears that the account was presented to the board of supervisors and allowed by it. It was then presented to the auditor to be allowed by him. This he refused. It was finally allowed by the auditor under a peremptory writ of mandate.

The court by its judgment directed the auditing of the account and the issuance of a warrant in the usual form to the plaintiffs in the action for the writ "or their attorney therein." The auditor allowed the account and issued the warrant, in accordance with the order of the court, to J. P. Sweeney & Co., or M. J. Cobb (the latter being the attorney referred to). Cobb sold the warrant to defendants. These facts appear clearly in the evidence.

We are of opinion that the warrant was issued in accordance with the judgment of the court, and that being the case, the defendants, when they purchased it, were not bound to inquire further into the matter of title than to see that it conformed to the direction given by the court. The defendants acquired a good title by the purchase from Cobb, and having paid Cobb for the warrant, they are not responsible to the plaintiffs herein.

As the foregoing must dispose of the case, it is unnecessary to determine the other questions discussed on the argument.

The judgment and order denying a new trial are reversed, and the cause remanded.

We concur: Myrick, J.; Sharpstein, J.

CLAFFEY, Petitioner, v. HEAD, Judge, etc., Respondent.

No. 8796; January 30, 1883.

Bill of Exceptions—Delay in Presentation for Settlement.—A court may settle a bill of exceptions notwithstanding delay in presenting it for the purpose, when the delay has been the result of arrangement by the opposing attorneys from motives of accommodation.

Mandamus.

E. A. Lawrence for petitioner; Gray & Haven for respondent.

By the COURT.—In this cause we think that the writ must issue. The whole matter, as to the bill of exceptions, seems

to have been one of accommodation between the attorneys of the respective parties, and, under the circumstances, we think all objections as to the presentment of the bill to the judge should be deemed waived.

The writ to be issued, however, will direct the judge of the court below to settle the bill of exceptions referred to in the petition and answer, and certify the same, if on examination he should find it to be true and correct.

HEWLETT, Appellant, v. STEELE et al., Respondents.

No. 7558; February 15, 1883.

Appeal—Court's Opinion not Part of Record.—A point urged on appeal, based upon the trial court's opinion, which is no part of the record, will not be considered.

Appeal—Point not Excepted to Below.—A point urged on appeal, as to which point no exception was taken at the trial, will not be considered.

Evidence—Hearsay.—Evidence of a Conversation had in a room where plaintiff was at the time need not be excluded as hearsay, if it is left to the jury to determine whether the plaintiff heard it.

Evidence.—Oral Testimony of the Contents of a Letter may be stricken out.

Witness—Examination, Control of by Court.—The trial court's discretion in preventing frequent repetitions of the same question to a witness and in restricting cross-examination is to be upheld, if not abused.

Evidence—Objections.—To Make Them Matters of Appeal, questions put to a witness by the trial court must be objected to at the time.

APPEAL from Superior Court, San Francisco.

H. C. Firebaugh for appellant; Robinson, Olney & Byrne for respondents.

By the COURT.—The court below found that plaintiff waived his right to the notes of defendant, under the com-

position agreement, and had received in lieu thereof the note of J. C. and George Steele for four thousand dollars, bearing interest at the rate of twelve per centum per annum (which note was paid), together with the right to retain a residuary interest in certain stocks; also, that the four thousand dollar note was paid. The evidence admitted without objection sustains the finding.

The appellant seeks to maintain his first point by reference to the opinion of the court below, which constitutes no part of the record.

The second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth "points" made by appellant cannot be considered, because no exceptions were reserved to the action of the court below in the particulars complained of.

The plaintiff (the appellant) moved to strike out, as hearsay, testimony of an alleged conversation which was admissible if heard by plaintiff. Plaintiff was in the room when the conversation was had, and may have heard it. The disputed question whether he did hear it was properly left to the jury.

The court below was justified in striking out oral testimony as to the contents of a certain letter.

Questions put by the judge below, of which appellant complains, were not objected to, and there was no abuse of power in preventing the repetition of the same question, once or oftener answered, or in restricting cross-examination within reasonable limits.

It is not necessary to consider other suggestions of appellant's counsel.

Judgment and order affirmed.

BEATTY, Petitioner. v. SUPERIOR COURT, Respondent.

No. 8800; February 15, 1883.

Mandamus to Compel the Superior Court to Place a Cause on Appeal from a justice's court on the calendar, and proceed with the trial thereof, issued on authority of Ward v. Superior Court, 58 Cal. 519.[1]

Mandamus.

Wm. H. H. Hart for petitioner; Henly & Oates for respondent.

By the COURT.—On authority of Ward v. Superior Court of Marin County, 58 Cal. 519, let the writ issue.

PEOPLE, Respondent, v. WOOD, Appellant.

No. 10,743; February 16, 1883.

Larceny.—Where the Contention of the Prosecuting Witness was that a transfer of money by him to defendant was intended to be a deposit, while that of the defendant was that it was intended to be a loan, the defendant was entitled to have the court instruct the jury to the effect that they should acquit him if they believed the understanding of both parties at the time of the transaction was that he was to use the money in his business.

APPEAL from Superior Court, San Francisco.

Leander Quint for appellant; Attorney General Hart for respondent.

By the COURT.—The defendant asked the court to give the following, among other, instructions, which was refused:

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[1] **Cited** in Acker v. Superior Court, 68 Cal. 246, 9 Pac. 110, as authority for holding that the defendant might be forced by mandamus to proceed to try a case, appealed from a justice of the peace, on law and fact, where, instead of so trying the case, the court has remanded it to the justice for trial de novo.

"If you believe from the evidence that at the time the defendant obtained the one hundred and twenty-five dollars from the prosecuting witness, Radcliff, he intended to use the same in his business, and he, Radcliff, so understood it, you should acquit the defendant."

It was an important question in the trial of this case whether Radcliff intended to part with the title to the particular money delivered to Wood, by permitting the latter to use it in his business, thus constituting a loan, or whether Radcliff intended that the identical pieces of coin should be retained by Wood as security for faithful service. The defendant testified that it was understood by both parties that the money was to be used in the business. If that was true, the subsequent refusal to pay did not make the original obtaining the money larceny. The testimony of Radcliff was the reverse of that of Wood. The defendant was entitled to the instruction.

Judgment and order reversed, and cause remanded for a new trial.

GOODWIN, Appellant, v. RICKABAUGH et al., Respondents.

No. 7751; March 2, 1883.

Foreclosure of Mortgage—Judgment not to Include Taxes.—In an action to foreclose a mortgage plaintiff cannot have the judgment include taxes he has paid on the mortgaged property unless his complaint contains appropriate averments.

Foreclosure of Mortgage.—Tender by a Defendant in an Action to foreclose a mortgage needs to be of a sum no greater than the complaint expressly calls for.

APPEAL from Superior Court, Lake County.

Wallace & Hostings and Welch & Britt for appellant; Platt and Elliott for respondents.

By the COURT.—The plaintiff could not have recovered for taxes without proper allegations relating thereto. Therefore the tender, being for the full amount his complaint entitled him to, was good.

Judgment affirmed.

SLOAN, Respondent, v. BLUXOME et al., Appellants.

No. 7962; March 3, 1883.

Street Law—Conflict Between Petition and Diagram.—In a proceeding in relation to a street improvement the fact that in some instances names, other than those of the parties named in the petition, who therein avow themselves to be owners of the lots platted on the diagram accompanying the petition, appear marked as owners of the lots on the diagram itself, should not disprove allegations of the petition as to ownership.

APPEAL from Superior Court, San Francisco.

J. C. Bates for appellants; Parker & Waterhouse for respondent.

By the COURT.—The persons who signed the petition allege that they are the owners of certain lots fronting upon the work which in said petition and the diagram attached to it are sufficiently described. These lots constitute a majority of the frontage on said work. On the diagram, in some instances, the names of other persons than the petitioners are written, so as to indicate, as appellants claim, that persons other than any of the petitioners were the owners of some of said lots. But in the absence of anything appearing, beyond the fact of those names having been so written thereon, we do not think that the bare circumstance of their being there tends in any degree to disprove the positive allegations of the petition as to the ownership of said lots.

Order affirmed.

ODD FELLOWS' SAVINGS BANK, Respondent, v. THOMAS NOONAN et al.; MATTHEW NUNAN, Appellant.

No. 7733; March 7, 1883.

Mortgage Foreclosure—Determination of Ownership.—In an action to foreclose a mortgage the record owner of the mortgaged property cannot complain if, after he by his answer has virtually invited the true owner to contest his title, the court determines the ownership.

APPEAL from Superior Court, San Francisco.

M. C. Hassett for appellant; Roche & Desbeck, J. C. Bates, John M. Burnett and D. H. Whittemore for respondent.

By the COURT.—We do not perceive in this case any just cause of complaint on the part of the defendant Matthew Nunan. The evidence is undoubtedly sufficient to sustain the finding of the court below to the effect that the leasehold interest, with the appurtenances, purchased from the estate of Armstrong, and taken in the name of said Matthew Nunan, was in fact the property of the defendant Thomas Noonan. The objection that there was no such issue between the defendants Thomas and Matthew is not well taken. The latter expressly alleged that he was the owner of the whole of the leasehold and appurtenances (including the purchase from the estate of Armstrong) on which issue was taken by the defendant Thomas. Having raised that issue, he cannot complain that the court determined it. The order in which the court below directed the respective interests in the property embraced in the plaintiff's mortgage to be sold, and the application of the proceeds, are just as they should be.

Judgment and order affirmed.

WARREN, Appellant, v. MOULD et al., Respondents.

No. 7796; March 7, 1883.

Trial—Failure of Proof—Judgment for Defendant.—When the Substantive Fact upon which depends the cause of action, as stated in the complaint, is found against the plaintiff on sufficient evidence, the defendant should have judgment.

APPEAL from Superior Court, San Francisco.

Estee & Boalt for appellant; Campbell & Campbell for respondents.

By the COURT.—The complaint charges that the plaintiff delivered to the defendants certain shares of stock to be by them sold on commission for and on account of the plaintiff: that the defendants did sell the stock so delivered to them for the plaintiff, and that after deducting defendants' commission there remains due to the plaintiff of the proceeds of the sale four thousand two hundred and twenty-seven dollars and forty-two cents.

The court below found the fact to be that the plaintiff did not at any time deliver to the defendants, or to either of them, any of the stock mentioned, to be by them sold for or on account of the plaintiff; and as we find in the record sufficient evidence to sustain that finding, it is unimportant to inquire whether the defendant Wetmore was or was not a partner of the defendant Mould. The substantive fact on which the cause of action stated in the complaint depends being found against the plaintiff, on evidence sufficient to sustain the finding, judgment was properly given for defendants.

Judgment and order affirmed.

FUNKE, Jr., Appellant, v. LYONS et al., Respondents.

No. 8106; March 8, 1883.

Appeal—Order Sustaining Demurrer—Indifference of Respondent.—Where, on appeal from an order sustaining a demurrer, the respondent does not appear and does not file points or authorities, the court is left to reverse the order if the pleading demurred to seems sufficient on its face.

APPEAL from Superior Court, San Francisco.

McAllister & Bergin, Burnett and Bartlett for appellant; Winans, Belknap & Godoy for respondents.

By the COURT.—This action was brought to restrain defendants from using plaintiff's trademark. The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and from the judgment rendered thereon plaintiff appealed.

On the hearing in this court the demurring parties did not appear, nor did they file points or authorities. We are therefore not informed as to the points on which the defendants relied, further than we gather from an examination of the complaint and or the appellant's authorities. From such examination it appears to us that the complaint was sufficient.

The judgment is therefore reversed, and the cause is remanded, with instructions to overrule the demurrer, with leave to defendants to answer.

HENEY et al., Respondents, v. ALPERS et al., Appellants.

No. 7920; March 27, 1883.

Appeal—Frivolous and for Delay Only—Damages as Penalty.—An appeal from a judgment in an action on a bond, given to release an attachment, where a demurrer to the complaint, which complaint alleged each step in the former action, the judgment, refusal of the defendant to pay same, and that it was still unpaid, and prayed accordingly, was overruled, and, upon an answer being then filed pre-

senting as the sole issue the recovery of the judgment, the court found for the plaintiff, is so plainly without merit that it must have been taken for delay only, wherefore the supreme court, while confirming the judgment appealed from, adds twenty per cent damages.

APPEAL from Superior Court, San Francisco.

George Turner for appellants; Cowdery & Preston for respondents.

By the COURT.—The bond in suit was given for the release of property attached. It was not given under the code, for the redelivery of the property or the payment of the value thereof, but was an undertaking "that in case the plaintiff recover judgment in said action, defendant will on demand pay to plaintiff the amount of whatever judgment may be recovered in said action." The complaint in this action alleged the commencement of the former action, the seizure under attachment, the giving of the bond, the subsequent recovery of the judgment, a demand upon the defendant therein that he pay the judgment, his refusal, and that the same is unpaid. The defendants demurred to the complaint. We see no error in the order of the court overruling the demurrer. The only issue of fact presented by the answer is as to the recovery of the judgment. The court found that on the 31st of July, 1878, judgment was recovered in the former action by plaintiffs against the defendants therein for eleven hundred and twenty-five dollars and twenty cents, and rendered judgment for plaintiffs herein for thirteen hundred and forty-four dollars and eighteen cents. We see no merit in any of the points presented by appellants, but are of the opinion that the appeal was taken for delay.

The judgment is therefore affirmed with twenty per cent damages.

BERNARD, Respondent, v. HEYNEMANN, Appellant.

No. 7925; March 28, 1883.

Trial—Conflicting Evidence—Jury to Judge Credibility.—On a question solely of fact in a case where the testimony is conflicting the jury is to be allowed to choose whom it will believe.

Sole Traders—Declaration—Publication of.—The act of April 12, 1872, did not make it essential to publish the declaration to carry on business as a sole trader.

APPEAL from Superior Court, San Francisco.

Sharp & Sharp for appellant; W. H. Fifield for respondent.

By the COURT.—The questions upon which this case turned were questions of fact. The testimony given by the plaintiff conflicted with that given by the defendant, and the jury saw fit to accept and base their verdict upon that of the plaintiff.

Under the act of April 12, 1852, publication of the declaration to carry on business as sole trader was not essential: Reading v. Mullen, 31 Cal. 104.

Plaintiff was not estopped by the action against Heynemann & Co. from maintaining this action; it did not constitute a bar.

Judgment and order affirmed.

SHAEFER, Appellant, v. KORBEL et al., Respondents.

No. 7682; April 4, 1883.

Trademarks—Cigar Boxes.—Under Civil Code, section 991, one may have a property in a trademark on cigar boxes, provided the mark does not relate only to the name, quality or description of them, or the place where they are produced or the business carried on.

APPEAL from Superior Court, San Francisco.

John L. Boone for appellant; C. Wittram for respondents.

By the COURT.—The trademarks alleged in the complaint to have been infringed are twenty in number, to wit: Mechanic's Own, Tony, Chromo, Fruit, Oregon, Green Seal, Grape, Eclipse, Bon Ton, Slug, Beauty, Don Juan, Victoria, Columbus, Imperial, Give Us a Light, Private Cuvee, Little Devil, Red Seal, and Star and Garter, each of which it is alleged plaintiff had appropriated and continuously used on cigar boxes to designate the origin and ownership of the said cigar boxes, and each of which, it is further alleged, the defendants have used, in violation of plaintiff's right.

The complaint was demurred to and the demurrer sustained on the sole ground that it did not constitute facts sufficient to constitute a cause of action. Unless all of these trademarks relate only to the name, quality or description of the plaintiff's cigar boxes, or the place where they are produced, or the business carried on, the demurrer should have been overruled: Civ. Code, 991.

We do not think that any of them "relates only to the name, quality, or description of thing or business, or the place where the thing is produced or business carried on."

Judgment reversed, with directions to the court below to overrule the demurrer, with leave to the defendants to answer within ten days thereafter.

LUCE, Petitioner, v. SUPERIOR COURT, etc., Respondent.

No. 8897; April 6, 1883.

Prohibition.—A Writ of Prohibition Does not Lie in a case open to appeal.

Appeal.—Where, in a Foreclosure Case, the Court Orders the Sale of exempt property, the error, if any, is to be corrected by appeal.

Prohibition.

Edward Lynch for petitioner; J. P. Meux for respondent.

By the COURT.—Petition for a writ of prohibition. Demurrer to the petition. The question is: Can a court fore-

close a mortgage, and, on such foreclosure, order a sale of personal property included in the mortgage, which property was in fact exempt by law from sale under execution? In such a case, we see no reason whatever for the issuance of a writ of prohibition. If any error has occurred, it can be reviewed on appeal.

The demurrer is sustained, and the alternative writ heretofore issued is discharged.

HAYES, Respondent, v. KINSMAN, Appellant.

No. 8179; April 10, 1883.

Appeal—Judgment-roll—Sufficiency of Complaint.—On appeal from a judgment, brought up on the judgment-roll, if the complaint states facts sufficient to constitute a cause of action and the findings support the judgment, the latter is not to be disturbed.

APPEAL from Superior Court, San Francisco.

Moses G. Cobb for appellant; William H. H. Hart for respondent.

By the COURT.—This is an appeal from a judgment, and the record before us consists of the judgment-roll alone. If the complaint states facts sufficient to constitute a cause of action, and the findings of the court support the judgment, we cannot disturb it. The court found upon all the issues in favor of the plaintiff, and we are satisfied that the findings support the judgment. The complaint, in our opinion, states facts sufficient to constitute a cause of action.

Judgment affirmed.

ELLIS, Appellant, v. JUDSON et al., Respondents.

No. 8031; April 11, 1883.

Quieting Title—Parties—Holders of Subsequent Deeds, With Notice.—If one conveys land to another by deed of bargain and sale, then conveys it—or assumes to do so—to another who has notice of the former conveyance and who then conveys to still another, having similar knowledge, he is neither a necessary nor a proper party to a suit to quiet title brought subsequently by the grantee named in the first conveyance.

Vendor and Vendee.—Subsequent Grantee With Notice.—If one conveys land to another by a deed of bargain and sale and then conveys it, or assumes to do so, to another who has knowledge of the first conveyance, this other takes nothing; a fortiori, the assign of this other takes nothing.

Quieting Title—Defenses—Subsequent Purchaser With Notice. To maintain his title against the grantee of A, B, who with knowledge accepts afterward a deed from A of the same property, cannot set up a failure by the first grantee to pay A the price agreed.

Appeal—Order for New Trial—Conflicting Evidence.—In a case where the evidence was conflicting an order for a new trial is not to be disturbed.

APPEAL from Superior Court, San Francisco.

M. G. Cobb for appellant; Harmon & Galpin for respondents.

SHARPSTEIN, J.—If, as alleged in the complaint and found by the court, the defendant Judson made and delivered to the plaintiff a deed by which he granted, bargained, sold and conveyed to her the premises in controversy, his subsequent conveyance of the same premises to defendant DeWitt, if he had notice of the prior conveyance, vested no title in him, and his subsequent conveyance to defendant Riley, if he had notice of said prior conveyance to the plaintiff, vested no title in Riley; and the plaintiff, upon such a state of facts, might maintain an action against DeWitt and Riley to quiet her title. To that action the defendant Judson would be neither a necessary nor proper party.

After making such a deed as the court has found that he did make, he certainly retained no interest in the premises in

trust for the plaintiff or otherwise; and we are unable to discover how DeWitt and Riley, or either of them, if they, or either of them, acquired any title by virtue of the deed of Judson to DeWitt, could be held to hold any title or interest in trust for the plaintiff. A prior conveyance of the character that the court found the conveyance of Judson to the plaintiff to be would vest in her a perfect legal title, which would prevail over any subsequent conveyance which Judson could make to anyone having notice of such prior conveyance. The motive for making or taking such subsequent conveyance would be wholly immaterial. The fact of there being a prior conveyance, coupled with the fact that the party taking the subsequent conveyance had notice of the prior one, would be altogether sufficient.

The allegations of fraud and conspiracy are altogether irrelevant. And it was quite immaterial in this action whether the plaintiff had paid Judson the consideration which she had agreed to pay him for his conveyance to her. That was a matter which concerned him and her only, and one in which DeWitt or Riley could have no interest. They would not be proper parties to an action which involved that question, and that appears to be the only question which could be litigated as between Judson and the plaintiff.

It is alleged in the complaint that the deed of Judson to DeWitt purported to grant, bargain, sell and convey the premises in controversy to DeWitt, and that he made a similar deed of the same premises to Riley. As these deeds were made subsequently to that of Judson to the plaintiff, it became material for the court to determine, under the issues raised by the pleadings, whether DeWitt and Riley were bona fide purchasers for value and without notice of the prior deed of Judson to the plaintiff. Upon that issue the evidence is conflicting, and we, therefore, cannot disturb the order granting a new trial.

As the other questions discussed by counsel appear to us to be wholly immaterial, we do not think it necessary to devote any more time and space to the discussion of them.

Order affirmed.

We concur: Thornton, J.; Myrick, J.

HOME LOAN ASSOCIATION v. WILKINS et al. (KING, Petitioner).*

No. 8949; April 14, 1883.

Mortgage Foreclosure—Appeal.—The Undertaking in Regard to a Deficiency, where the judgment appealed from is for the sale of mortgaged premises, is required only in the case of an appellant in possession of the premises adjudged to be sold.

Supersedeas.

Lawrence for petitioner; Brandon for respondent.

By the COURT.—This is an application for an order staying the execution of a judgment for the sale of mortgaged premises. The application is made on behalf of a party claiming an interest in the premises subsequent and subject to the mortgage.

We are of the opinion that the moving party (King) is entitled to the order. The undertaking in regard to a deficiency where the judgment is for the sale of mortgaged premises (see Code Civ. Proc., sec. 945) is required only in the case of an appellant in possession of the premises adjudged to be sold. This we consider to be the meaning of the section just referred to, and in this opinion we all concur. Counsel for petitioner will prepare an order and submit it to the court.

LINEHAN, Respondent, v. JOOST, Appellant.

No. 8095; April 14, 1883.

New Trial—Denial of Motion—Evidence Supporting Finding. The denial of a new trial, after a finding that an assignment of a lease was procured by fraud, is to be sustained if ordered upon any supporting evidence.

*For opinion in bank, see 64 Cal. 379.

APPEAL from Superior Court, San Francisco.

Clark and Pillsbury for appellant; Lloyd Baldwin for respondent.

By the COURT.—The finding that the defendant, B. Joost, obtained from the plaintiff an assignment of the lease in controversy without consideration and through fraud and deceit is attacked on the ground that it is not justified by the evidence. We have carefully examined that which is relied on to sustain that finding, and have come to the conclusion that there is some evidence tending to support it. Such being the case, we cannot disturb the order denying the motion for a new trial.

No error appearing in the record, the judgment and order are affirmed.

McCRACKEN, Appellant, v. PACIFIC COMMERCIAL COMPANY et al., Respondents.

No. 7598; April 18, 1883.

Appeal—Bill of Exceptions—Statute of Limitations.—Evidence of facts relied on to overcome the statute of limitations, set up as a defense, must appear in the bill of exceptions in order to be considered on appeal.

APPEAL from Superior Court, San Francisco.

B. S. Brooks for appellant; R. B. Wallace for respondents.

THORNTON, J.—Action of ejectment against S. C. Hastings and other defendants, who were his tenants.

If the statute of limitations could be relied on as a defense in this case, our opinion is that such defense is made out.

It is contended that the statute of limitations did not run as to the lot sued for, for the reason that it was held by the city and county of San Francisco for the public use.

There is no evidence of this in the bill of exceptions, and no such fact is found. This being the case, no such fact is before us for consideration.

If any such matter appeared in evidence, we must hold, as the case is presented to us, that it was negatived by the court below. Under these circumstances we are of opinion the contention of the appellant cannot be maintained, and we cannot say that the court below was wrong in holding that plaintiff's action was barred by the statute of limitations.

We find no error in the record, and the judgment and order are affirmed.

We concur: Myrick, J.; Sharpstein, J.

DYER, Respondent, v. RYAN et al., Appellants.

No. 7576; April 18, 1883.

Action—Preliminary Demand for Excessive Sum.—In an action on a contract demand may not be made for a sum exceeding what the contract calls for.[1]

APPEAL from Superior Court, San Francisco.

Campbell, Fox & Campbell and Whittemore & McKee for appellants; Wood and Bates for respondent.

By the COURT.—This case is similar to Dyer v. Chase, 52 Cal. 440. A larger sum was demanded than was legally due under the contract, and, for the reasons stated in that case, the judgment is reversed and cause remanded.

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[1] **Cited** and approved in Dyer v. Scalmanini, 69 Cal. 641, 11 Pac. 327, where it is intimated that even though the amount sued for is excessive only through error in the proceedings—the defendant being chargeable to the full, but for the technicality—the error must first be corrected by appeal to the board of supervisors.

MacNEIL, Appellant, v. WARD, Respondent.

No. 8882; April 20, 1883.

Foreclosure of Mortgage.—A Judgment in a Foreclosure Suit Does not Fail for not directing the docketing of judgment for a deficiency.

Foreclosure of Mortgage.—A Judgment in a Foreclosure Suit Does not Fail for not adjudging expressly the defendant's personal liability to the plaintiff, if such an adjudging is to be inferred from it.

APPEAL from Superior Court, Los Angeles County.

R. M. Widney for appellant; W. P. Gardner for respondent.

THORNTON, J.—The judgment in this case is not amenable to the criticism of counsel for appellant, that it is erroneous because there is no direction in it that a judgment be docketed for deficiency. In this respect it (the judgment) accords with Leviston v. Swan, 33 Cal. 480, where the question is considered and correctly determined.

The only point in which the judgment seems to be defective is in not expressly adjudging that the defendant Ward is personally liable to the plaintiff for the money found to be due. This is inferentially done.

The court below is directed on the going down of the remittitur to amend the judgment by inserting words remedying this defect, and as thus modified the judgment will stand affirmed.

We concur: Sharpstein, J.; Myrick, J.

WHITING & MARSHALL, Appellants, v. STEEN, Respondent.

No. 7669; April 27, 1883.

New Trial.—All Presumptions are in Favor of an Order granting a new trial.

New Trial.—A Certain Finding by the Court that there was consideration for the note sued upon is no argument against a new trial ordered by the court after one resulting in plaintiff's favor, when the record discloses that the finding on the question of consideration was not sustained by the evidence.

Bills and Notes—Parol Evidence to Explain.—If a note has been given with the understanding that it is to be used in a particular way or with a particular qualification, parol evidence is admissible in an action between the original parties to prove the understanding.

Equity—Interposition to Prevent Fraudulent Use of Instrument.—A court of equity will interfere to prevent the fraudulent use of a paper for a purpose not contemplated by the parties at the time it was executed.

APPEAL from Superior Court, San Francisco.

C. T. Emmett for appellants; C. E. Royce for respondent.

McKEE, J.—Appeal from an order granting a new trial.

All presumptions are in favor of the correctness of the order, and the appellants in error must show, clearly and affirmatively, by the record of the case, that the order is erroneous: Clark v. Sawyer, 48 Cal. 133; Moore v. Massini, 43 Cal. 389; People v. Best, 39 Cal. 690.

It is contended that the order is erroneous, because the court found: "That the promissory note, which constitutes the cause of action, was made and delivered by the defendant in consideration of the adjustment, at the amount in said note set forth, of an open and unliquidated account, then existing between the Glasgow Iron and Metal Importing Company, for whom the payee named in said note was then and there the agent, and the satisfaction of such account by the credit against the same of the said note"; and, being found on that consideration, it was not permissible to prove by parol evidence the defense set up in the answer.

But the record discloses the fact that the finding upon the question of consideration was not sustained by the evidence. There is no conflict in the evidence.

As it appears from the record, the case arises out of an action upon a promissory note for two thousand dollars, which the defendant made upon the 10th of April, 1879, payable one day after date to the order of R. C. Marshall. R. C. Marshall, although the nominal payee, was not the real owner of the note. It was obtained from the defendant for the Glasgow Iron and Metal Importing Company, a concern of which John Marshall, one of the plaintiffs in the case, and the father of R. C. Marshall, was then the sole proprietor. But contemplating making a change in the firm by bringing in a partner, he sent his son from Glasgow, in Scotland, to settle up the past transactions of the concern by collecting the moneys due, or taking promissory notes. The defendant was a party to one of these transactions. He, it appears, had received from the company in December, 1877, a quantity of old machinery, including a steam-engine, which he verbally agreed to repair and sell, in pieces and lots, from time to time, as best he could, until he had realized from the sales and paid from the proceeds the sum of two thousand six hundred dollars; and whatever remained of the machinery or proceeds of sales after the payment of that sum to the company was to be retained by him. Before the date of the note he had made some sales, and had paid to the company six hundred dollars, leaving a balance of two thousand dollars to be realized and paid according to the terms of the agreement between himself and the company.

In that condition of the transaction, the managing agent of the company, acting under instructions from R. C. Marshall, had the bookkeeper of the company prepare the draft of the note in suit, and he took it and presented it to the defendant for his signature. The defendant signed it, with the distinct understanding that it was to be used as a mere memorandum, for the company, of the machinery which he had on hand for disposal according to the terms of the agreement between himself and the company, and of the amount to be paid by him from the proceeds of sales under the agreement; and that it was not to be used to change in any respect the terms of that agreement. "The note was not given to settle the defendant's

account with the company." But when the agent obtained the signature of the defendant to the note upon the understanding and agreement that it was to be used as subsidiary to and for the purposes of the real verbal arrangement between the defendant and the company, instead of informing the company of the understanding, he handed the note to the bookkeeper of the company, who put it on the files with other notes of the company, and credited it on the books of the company to the account of the defendant without any knowledge whatever on the part of the defendant. The note remained in that condition until there was a change in the firm by the admission, on May 1, 1879, of Whitney, one of the plaintiffs, when R. C. Marshall, the nominal payee, indorsed the note to the company. The action must, therefore, be considered as between the Glasgow Iron Metal Importing Company and the defendant—and being between the original parties, the defendant is not subject to the law-merchant governing promissory notes.

Prima facie, however, the note was given upon a good consideration; but parol evidence is always admissible to prove that there was no consideration for a promissory note, or that what purports to be a simple contract was not a contract at all, or that it was only a portion of the real contract between the parties, or that as a contract it was to be used in a particular way, or with a particular qualification. If a contract in form has been made with the understanding that it is to be used in a particular way or with a particular qualification, it would be a fraud to violate the understanding; and parol evidence is admissible in an action, at law or in equity, between the original parties, to prove the understanding.

In Barker v. Prentiss, 6 Mass. 433, the holder of a bill of exchange had brought an action against the drawer, and the defendant pleaded, by way of defense, that the bill had been only indorsed for a special purpose. The court held that parol evidence was admissible to prove the defense. "And," says Parsons, C. J., "where the action is between the original parties, parol evidence may be given to show that the whole of a simple contract was not reduced to writing, but that it was made with certain conditions, or limitations, expressly agreed upon, but not contained in the written contract." So in Develin v. Coleman, 50 N. Y. 531, where promissory notes were indorsed and delivered to be used for a purpose altogether different

from that for which they were afterward used, the court held that the payees acquired no title to them. And in Wright v. McPike, 7 Mo. 175, the doctrine is thus stated: "As between the original parties, if one has procured the signature of the other to a written agreement, whether by fraud or not, which does not contain the contract made by the parties, but a different one, he cannot be permitted to avail himself of that contract, but must stand by the one which was in fact entered into by both."

A court of equity will also interfere to prevent the fraudulent use of a paper for a purpose not contemplated by the parties at the time it was made: Murray v. Dake, 46 Cal. 644; Pierce v. Robinson, 13 Cal. 116. Parol evidence, says the supreme court of Pennsylvania, is admissible to show fraud in the formation of a written instrument, or a fraudulent use of it afterward, whether obtained by fraud or not: Oliver v. Oliver, 4 Rawle (Pa.), 144, 26 Am. Dec. 123; Hultz v. Wright, 16 Serg. & R. (Pa.) 345, 16 Am. Dec. 575.

Whence it results that the court below did not err in admitting parol evidence of the defense in the case; and as the uncontroverted evidence shows that the note was not given in consideration of the settlement of an unsettled account between the parties, nor of any sales made by the defendant under the real contract between them, nor as a substitute for that contract, it follows that the finding of the court as to the consideration of the note was not sustained by the evidence, and the motion for a new trial was properly granted.

Order affirmed.

CONCURRING OPINION.

There being at least a substantial conflict in the evidence as to the consideration of the instrument sued on, and the court having granted a new trial, we concur in the judgment.

McKinstry, J.
Ross, J.

BAKER, Appellant, v. O'RIORDAN, Respondent.*

No. 7784; May 8, 1883.

Trial—Inconsistent Findings as Basis for Judgment.—If in an action to set aside a decree in distribution the court, after finding that the defendant procured the decree without notice to the plaintiff and without any appearance or knowledge on his part, finds that a named person "assumed to represent plaintiff at said hearing and making of said decree of distribution," and finds again that plaintiff was not represented at the hearing, the findings are too contradictory to base a judgment upon.

Words and Phrases—"Assumed to Represent."—When it is said that a person assumed to represent another, the meaning is that he took upon himself to represent that other and did not represent him; in which case it cannot be said that the other was not represented.

APPEAL from Superior Court, San Francisco.

H. J. Tilden and P. C. Coogan for appellant; J. C. Bates for respondent.

THORNTON, J.—This action was brought to set aside a decree of the probate court, on the ground that it was procured by defendant herein without notice to the plaintiff, and without any appearance or knowledge on his part, and that it was based on false testimony.

The court below finds as above set forth, and in addition finds as follows:

"That one F. J. Castlehun assumed to represent the plaintiff at said hearing and making of said decree of distribution, but that he was never employed by the plaintiff for that or for any purpose, and that he had no power or authority whatever to appear for or represent the plaintiff therein, and that the plaintiff had no knowledge that he had so appeared until long after the decree of distribution had been made, to wit, January, 1880."

"That the plaintiff from 1871 has not resided or been in this state, and that he never received or had any notice of the petition for the distribution of said estate, nor of any of the proceedings of said probate court in relation to said estate

*For subsequent opinion in bank, see 65 Cal. 368, 4 Pac. 232.

until January, 1880, and that at the hearing of said petition this plaintiff was not represented, and no evidence whatever was introduced on behalf of the plaintiff, and his claim to said real estate was not presented and considered by said court. And he never heard or had notice that the defendant claimed that he had conveyed his interest therein to her until January, 1880, when he first learned of said decree of distribution."

These findings are contradictory. In the finding first above quoted, it is found that Castlehun "assumed to represent the plaintiff at the hearing and making of said decree of distribution." When it is said a party assumes to represent the plaintiff, the meaning, in our judgment, is, that he took upon himself to represent the plaintiff, and did represent him. It cannot, then, be said that plaintiff was not represented (Denton v. Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; Brown v. Nichols, 42 N. Y. 26; Abbott v. Dutton, 44 Vt. 546, 8 Am. Rep. 394); and the finding to that effect, in the finding secondly above quoted, contradicts the previous finding.

Under these circumstances we reverse and remand the cause for distinct finding on this point, on the evidence already given in the case, or on such evidence and any further evidence which may be produced to the court by the parties hereto, and then to render judgment on the findings.

The order will be entered by the clerk as follows:

"This cause having been submitted and considered by the court, it is hereby ordered that the judgment of the court below be and the same is hereby reversed, and the cause remanded, with directions to the court below, on the evidence already taken, or on such evidence and any further evidence which may be produced to it by the parties, the said court to find whether the plaintiff Baker was or was not represented on the hearing of the application for the decree sought to be set aside in this action, and thereon to proceed to render judgment."

We concur: Myrick, J.; Sharpstein, J.

SAVILLE, Administrator, etc., Appellant, v. FRISBIE, Respondent.

No. 8183; May 11, 1883.

Dismissal of Action—Right of Plaintiff to Show Cause.—It is error to dismiss an action without giving the plaintiff an opportunity to show cause why it should not be dismissed.

APPEAL from Superior Court, San Francisco.

P. G. Galpin for appellant; Stow, Irving, Brooks and Carpenter for respondent.

By the COURT.—The court below should have granted the motion to vacate the order and judgment dismissing the action. The circumstances attending the dismissal rendered it proper that an opportunity be afforded the plaintiff to show cause, if any existed, why the action should not be dismissed.

Order reversed.

NORTON, Appellant, v. ZELLERBACH, Respondent.

No. 7724; May 12, 1883.

Trover and Conversion—Limitations—Nonsuit.—In a civil action for embezzling or converting personal property, where the time of the alleged grievance does not appear by the pleadings or testimony, a nonsuit based on the statute of limitations is not to be sustained.

APPEAL from Superior Court, San Francisco.

A. W. Roysdon and Pillsbury & Titus for appellant; C. Benham for respondent.

THORNTON, J.—In this case a nonsuit was granted on the ground that the action was barred by the statute of limitations. The action was brought for embezzling and unlawfully alienating and converting certain personal property belonging to

the estate of a deceased person. We have examined the pleadings in the cause and testimony in the bill of exceptions, and are unable to ascertain when the embezzling or unlawful alienation or conversion occurred. It is impossible, then, to determine when the statute of limitations commenced running. In this state of the case we cannot say that the action was barred by the statute when it was commenced, and the judgment is reversed and cause remanded.

We concur: Myrick, J.; Sharpstein, J.

FANNING, Appellant, v. LEVISTON et al., Respondents.

No. 7775; May 30, 1883.

Street Law.—The Grade of Vallejo Street, in the city of San Francisco, between Montgomery and Kearny streets has been legally established.

APPEAL from Superior Court, San Francisco.

J. M. Wood for appellant; Wm. Leviston for respondents.

McKEE, J.—Action to foreclose a street assessment in San Francisco, for the grading of Vallejo street, on "Telegraph Hill," from Montgomery to Kearny.

Upon one of the issues raised by the pleadings the court found that the grade of the street had never been officially established; and the only question discussed on the appeal is that this finding is not sustained by the evidence.

It was proved by evidence, in which there was no conflict, that in the year 1854 a board of engineers reported in writing to the common council of the city of San Francisco grades for all the streets of the city, with reference to a basis which had been fixed and adopted by the council in the year 1853. The common council adopted the report, and by Ordinance No. 608 it was ordained that the grades, as specifically defined by the report, be the permanent grades of the streets of the city. That part of the ordinance which relates to the grade and intermediate grades of Vallejo street is as follows:

"Montgomery and Vallejo streets, one hundred and fifteen feet above base.

"Kearny and Vallejo streets, one hundred and forty-two feet above base.

"Montgomery and Greenwich streets, one hundred and thirty feet above base.

"Kearny and Greenwich streets, two hundred and thirty feet above base.

"Second and Townsend, thirty feet above base.

"Third and Townsend, thirty feet above base. . . . .

"Grades of points of streets intermediate between crossings.

"On Townsend street, 265 feet west of Second street, between Second and Third streets, 68 feet over base.

"On Townsend street, 285 feet west of Second street, 68 feet above base.

"On Greenwich street, between Dupont and Kearny, 137 feet 6 inches east of Dupont, 162 feet above base.

"On Greenwich street, between Dupont and Kearny, 68 feet 9 inches west of Kearny, 206 feet above base."

Accompanying the report of the engineers were certain profiles, on which were drawn lines of the grades of the streets, and marked figures of the height of the grades from the base; and the profiles as part of the report were incorporated into the ordinance. But the profile of the grade of Vallejo street shows that the blue line indicating the grade was not continued from Montgomery to Kearny street. A break occurs in the line between those intermediate streets, and instead of the blue line of the grade there is given a dotted line, which is explained by a note to the report incorporated in the ordinance, as follows:

"NOTE.—On the official profile, where dotted lines occur (in blue), or surface lines are left, the grade defers to the surface."

Upon this it is contended that there was no grade reported or established on Vallejo street between Montgomery and Kearny.

But the figures of the profile at the ends of the dotted line represented the heights of the grade of the street from the base of the city, and the dotted line represented the grade line from Montgomery to Kearny, as the surface or middle line of the street. In other words, the grade of Vallejo street

from Montgomery to Kearny, along the dotted line, "defers to the surface." The natural surface of the hill at those points corresponding to the heights of the grade at the same points above the base of the city, and the level of the surface indicated by the points and the figures was the line of the grade. To that level it might have been necessary, in grading the street, to cut down the hill on one side and fill up on the other.

It follows, when the city adopted the profiles accompanying the report of the board of engineers, which was incorporated in Ordinance No. 608, and ordained that the grades, as specifically defined in the report, should be the permanent grades of the streets of the city, that the grade of the street in question was officially established.

Judgment and order reversed and cause remanded.

I concur: Ross, J.

I concur in the judgment: McKinstry, J.

WIGGIN, Appellant, v. AYRES, Respondent.

No. 8752; June 8, 1883.

Carrier—Injury to Passenger—Trial—Conflicting Instructions.—An instruction in effect that, it being admitted that defendant was a common carrier and that plaintiff on a day named was a passenger riding in defendant's coach, and while so riding was upset and was injured thereby, plaintiff had made out a prima facie case, unless defendant proved the upsetting to have been the result of inevitable casualty, was not in conflict with another, in substance, "if you believe from the evidence in this case (that is, on both sides) that the upsetting was not occasioned by the negligence and carelessness of the defendant but by an act of God you should find for defendant."

APPEAL from Superior Court, Modoc County.

C. W. Taylor and E. M. Barnes for appellant; J. R. Kittrell and F. W. Ewing for respondent.

MYRICK, J.—The court instructed the jury: "In this case it is admitted by the defendants that they are common car-

riers, and that on the thirtieth day of November, 1880, the plaintiff, Ellen D. Wiggin, was then and there riding as a passenger in one of their stage-coaches, and that while she was so riding in said coach, said coach was upset and overturned, and that said Ellen D. Wiggin was injured thereby. Such being the case, then I instruct you that plaintiffs have made out a prima facie case, unless defendants have shown by satisfactory proof that the overturning and upsetting of the stage-coach was the result of inevitable casualty, or from some cause which human care and foresight could not prevent."

At the request of defendants the court gave the following instruction:

"The jury are instructed that in civil cases, such as the one at bar, the plaintiff is required to establish his right to recover by a preponderance of evidence, and where the proof is evenly balanced it is the duty of the jury to find a verdict in favor of the defendants. Therefore, if you believe from the evidence in this case that the plaintiffs in this action have failed to prove by a preponderance of evidence that the defendants' stage-wagon was upset on the thirtieth day of November, 1880, at the place named in the complaint, and the injuries to Ellen D. Wiggin then and there received as set forth in the complaint, and that such upsetting was occasioned by the negligence and carelessness of defendants, and not by an 'act of God,' you should find a verdict in favor of the defendants."

It is urged that there is a conflict in these instructions. If, at first view, there would seem to be a conflict, it is more apparent than real. The first instruction was according to the rule laid down in Boyce v. Cal. Stage Co., 25 Cal. 460. The second instruction does not say that the plaintiff, in addition to proving the overturning of the coach and the injuries caused thereby, must also prove negligence, as a distinct fact, further than as implied, but it says, in substance, "if you believe from the evidence in the case (that is, evidence offered by both parties) that the upsetting was not occasioned by the negligence and carelessness of defendants, but was caused by an act of God, you should find for defendants."

No error appears. Judgment and order affirmed.

We concur: Sharpstein, J.; Thornton, J.

PEOPLE, Appellant, v. REYNOLDS, Respondent.

No. 10,817; June 14, 1883.

Appeal—In the Absence of a Bill of Exceptions the transcript is held as showing no error.[1]

APPEAL from Superior Court, Merced County.

Attorney General and F. H. Farrar and R. H. Ward for appellant; J. K. Law and D. S. Terry for respondent.

By the COURT.—The appeal is by the plaintiff from an order granting a new trial. There is no bill of exceptions. Section 1246 of the Penal Code provides that the clerk of the superior court shall transmit to the supreme court "a copy of the notice of appeal, and of the record, and of all bills of exceptions, instructions and indorsements thereon." Upon such transcript the cause is heard here.

The "record" referred to in the foregoing section is constituted of: (1) The information; (2) A copy of the minutes of the trial; (3) The charges given or refused, and the indorsements thereon; and (4) Copy of the judgment: Pen. Code, 1207.

Any written or other opinion of the learned judge of the lower court is not before us.

No error appears in the transcript.

Order affirmed.

[1] **Cited** and approved in Wilson v. Wilson, 64 Cal. 94, 27 Pac. 861, where, as the court say, no course had been taken to make the opinion or the alleged principle on which it was based a part of the record of the case.

HENRICKSON, Appellant, v. SMITH, Respondent; WE YING and POK WING WAH, Interveners and Appellants.

No. 8688; June 14, 1883.

Bills and Notes—Note Payable After Named Event—Maturity. A note expressly made payable after the maker should be released from an attachment then in force is not, before that event, subject to a demand for payment.

Assignment—Obligor Treating With Assignee.—The obligor of a claim which apparently has been assigned is justified in treating with the assignee, if without knowledge or notice that the assignee is not the bona fide owner of it.

Fraudulent Assignment.—The Release from a Past Indebtedness due from the fraudulent assignee of a claim, who assumes to transfer the latter, is not a sufficient consideration as against the just owner, so as to insure rights in the transferee.

Fraudulent Assignment—Notice to Holder.—One who purchases a claim from an assignee with notice of mala fides in the assignment cannot withhold the claim from the assignor.

APPEAL from Superior Court, Sacramento County.

C. P. Goff and Young & Young for appellant; G. L. Johnson for respondent; D. E. Alexander for interveners and appellants.

By the COURT.—Plaintiff counts upon the instrument following:

"$500. Sacramento, June 11, 1879.

"For value received I promise to pay Charles P. Goff, or order, the sum of five hundred dollars, payable when I am released from liability upon an execution issued upon a judgment rendered upon the 6th day of June, 1878, in the Fourteenth Judicial District of the State of California, in and for the county of Nevada, in favor of Ba Chow and Ah Boy, and against Long Ah Noy, Ah Soey and Lee Ah Noy, copartners, under the firm name and style of Yung Tye Lee Kee, for six hundred and thirty-five dollars and costs.

(Signed) "S. D. SMITH.

"Witness: GROVE L. JOHNSON."

And also upon an alleged indebtedness, upon a balance of account due from defendant to one Ah Gue, in the sum of three hundred and fifty dollars, assigned to Chas. P. Goff, and by him, for valuable consideration, to plaintiff.

There was evidence that defendant had received notice of garnishment from the sheriff of Nevada—that any sum due from him to the defendant in the action mentioned in the foregoing writing had been attached, etc. Also of an execution issued in the same action and served upon the defendant herein. There was no evidence that any liability on the part of defendant created by the service of notice of the attachment or by the execution had been released.

There was evidence, therefore, to sustain the finding of the court that the sum of money mentioned in the note or writing was not due when this action was commenced.

The case does not show any notice to defendant herein of the frauds alleged in the intervention connected with the assignment from Ah Gue to Goff and from the latter to plaintiff. The defendant therefore was justified in dealing with the plaintiff as the owner of the claim of Ah Gue.

(The transcript contains no answer by plaintiff or defendant to the complaint of the interveners. But no point is made on the failure to answer the intervention. The case was apparently tried as if it had been answered.)

The finding and judgment as to the indebtedness for three hundred and fifty dollars alleged in the second count of the second amended complaint of the plaintiff were in favor of the interveners, and of this portion of the judgment interveners do not complain.

The court found, upon evidence, that the averments of the intervention as to the fraudulent intent as to the assignment from Ah Gue were true, and that the facts were known to plaintiff when he took his assignment—no consideration being given therefor except a release of past indebtedness from his assignor to plaintiff.

The judgment for three hundred and fifty dollars and costs in favor of interveners was therefore correct.

Judgment and orders affirmed.

HALEY, Respondent, v. NUNAN, Appellant.

No. 8143; June 23, 1883.

Appeals—Overruling Demurrer at Request of Appellant.—A party whose demurrer has been overruled at his own request will not be heard, on appeal from the judgment entered in the case, to question the correctness of the ruling.

Trial—Findings.—After a Finding "That the Plaintiff was the owner in possession of the property on the day that the defendant seized upon it and removed it from her possession, custody and control," it is not necessary for the court to make a further finding, so as to dispose of any issue raised by the answer as to ownership of the property by some third person.[1]

APPEAL from Superior Court, San Francisco.

F. M. Husted for respondent; M. C. Hassett for appellant.

McKEE, J.—Action to recover damages for the conversion of personal property. Upon motion of defendant's attorney, a general demurrer to the complaint was overruled, with leave to answer. Yet it is now contended that the court erred in overruling the demurrer. But where a demurrer has been overruled at the request of the demurring party, he will not be heard, on an appeal from the judgment entered in the case, to question the correctness of the ruling: Coryell v. Cain, 16 Cal. 568; Mecham v. McKay, 37 Cal. 154.

The answer filed by the defendant contained specific denials of all the allegations of the complaint. Upon the issues raised the court found that the plaintiff was the owner and in possession of the property at the time of its seizure by the defendant; and that the defendant wrongfully seized the property and converted it to his own use. But there was an amended answer, which contained, besides specific denials of the allegations of the complaint, affirmative averments that the defendant, as sheriff of the city and county of San Francisco, seized the property and sold it, as the property of one A. Husted, to satisfy an execution in favor of ——— Bartlett v. Husted

[1] Cited and followed in Murphy v. Bennett, 68 Cal. 530, 9 Pac. 738, in an action for damages for tearing down a barn and converting the materials.

"and that at the time of the seizure and sale the property was the individual property of A. Husted and not the property of the plaintiff." And it is contended that there is no finding upon the issue raised by the amended answer as to the ownership by Husted of the property at the time of the seizure of it by the defendant.

The amended answer is indorsed: "Filed nunc pro tunc as of date November 31, 1880." Whether it was in fact filed before or after the trial, or at any time before the court filed its findings, does not appear. But assuming that it was on file at the trial and raised the issues which were tried, we see nothing in the contention that there is no finding upon the issue of ownership. The finding is, "that the plaintiff was the owner and in possession of the property on the day that the defendant seized upon it, and removed it from her possession, custody and control." The finding is based upon the evidence in the case, and we must presume that the evidence proved the fact; and as the plaintiff was the owner, of necessity it follows that Husted was not. The appeal being on the judgment-roll alone, the presumption is, there was no evidence to prove that Husted was the owner: Clark v. Fredericks, 105 U. S. 4, 26 L. Ed. 938. The finding was therefore sufficient: Smith v. Acker, 52 Cal. 217.

Judgment affirmed.

We concur: Ross, J.; McKinstry, J.

GILMORE, Respondent, v. AMERICAN FIRE INSURANCE COMPANY, Appellant.

No. 8993; June 26, 1883.

Appeal—Motion to Dismiss—Certificate of Clerk—Appellant Without Fault.—Although under the rules of the supreme court the transcript shall be filed within forty days after the appeal is perfected, and a motion to dismiss for failure in this respect must be accompanied with a certificate of the clerk of the court appealed from to show the fact and date of filing the bill of exceptions and the statement on appeal, such motion to dismiss must be held as prematurely made if the clerk's accompanying certificate is not defi-

nitely to the point, while by another certificate of his, filed by the other side, it appears that the appellant has proposed the bill and statement, and the respondent has proposed amendments, but that neither such bill nor such statement has been settled.

APPEAL from Superior Court, Los Angeles County.

Brunson & Wells for respondent; Gardiner, Grady and Hawes for appellant.

By the COURT.—Motion to dismiss appeal on the ground that the transcript was not filed within forty days after the appeal was perfected. The facts are as follows:

Judgment was entered in the court below in favor of respondent March 17, 1882. Defendant moved to vacate the judgment and for a new trial on the minutes of the court and affidavits. Its notice of intention was filed March 27, 1882. The motion for a new trial was denied January 11, 1883. On March 12, 1883, three separate and distinct notices of appeal were served on respondent and filed, to wit: a notice of an appeal from the judgment, a notice of an appeal from the order denying the motion for a new trial, and a notice of an appeal from the order denying the motion to vacate the judgment. Undertakings were filed in due form March 15, 1883, and the appeals were thereupon perfected.

Rule 2 of the supreme court provides that a transcript shall be filed within forty days after the appeal is perfected, and the bill of exceptions and the statement (if there be any) are settled; and rule 4 provides that on motion to dismiss an appeal for failure to file transcript within prescribed time, there shall be presented the certificate of the clerk below showing (among other things) the fact and date of filing bill of exceptions and the statement on appeal, if there be any.

The clerk's certificate, upon which this motion is based, does not show that there was or was not a bill of exceptions, or statement filed in the case. But the appellant has filed a certificate of said clerk, showing that a statement and a bill of exceptions have been proposed by appellant, and that amendments thereto have been proposed by respondent, and that neither such bill of exceptions nor statement has been settled.

Upon these facts we think the motions to dismiss premature.

Motions denied.

WILLIAMS, Plaintiff, v. CONROY, Respondent; EASTLAND et al., Appellants.

No. 7967; June 29, 1883.

Appeal—Dismissal.—On Appeal from an Order Denying a New Trial, taken by one of several defendants (being dissatisfied with the adjustment effected by the findings as between him and his co-defendants rather than as between him and plaintiff), a motion to dismiss made by plaintiff should be denied.

New Trial.—Where the Defendants Do not Actually Question the acts of the plaintiff and are satisfied with the findings so far as they concern him (the dissatisfaction being rather so far only as those findings concern the defendants inter se), they cannot justly ask for a new trial, in which, necessarily, plaintiff must be a party, in order to secure a different adjustment.

APPEAL from Superior Court, San Francisco.

Doyle & Barber, J. M. Seawell and J. S. Bugbee for plaintiff; E. R. Taylor for Eastland, trustee; C. T. Botts for certain appellants.

MYRICK, J.—The motion to dismiss the appeal is denied. Though the action was brought by Williams, and he remained as plaintiff in the case as a whole, yet the portions of the decree appealed from relate, on their face, only to matters in controversy as between the defendants. In such matters Williams had no interest, would not be affected by any order relating thereto which might be made on the appeal, and was, in no respect, an adverse party to the appellants.

The appeal was taken from the order denying a motion for a new trial, and, as said above, from portions of the decree. But one undertaking was necessary to be given, no stay being required.

Substantially, the matters presented by the appellants for consideration on this appeal relate to the expenditure by Williams, while trustee, of thirty-nine thousand nine hundred and eighty-six dollars and eighty-seven cents, in improvements upon a lot which had been specifically devised to the Ketlers, and whether that amount should be deducted from the general trust fund belonging to the Conroy and Ketler trusts, so

called, and, in the adjustment of the effects on hand as between the two trusts, those effects should be divided equally, or whether the Conroy trust should have allowed to it a sum sufficient to balance the amount expended on the Ketler lot, so as to make equal the amounts to go to each trust, taking into account the amount expended. As to this expenditure, the findings of the court, filed November 11, 1875, as the result of the trial had in April, 1874, contain the statements that these sums were expended by plaintiff out of the mixed trust funds in his hands, in the construction and erection of a brick and iron building and in the erection of a party-wall on the lot; that the building was a permanent and substantial structure, was erected at fair and reasonable prices, and that the rents were thereby increased from about two hundred and eighteen dollars to about four hundred dollars per month.

These findings were supported by evidence, as appears in the bill of exceptions of the appellants, wherein it is stated (page 108 of the transcript) that the plaintiff testified that the property when it came to his possession was scarcely tenantable; that the building erected by him on the lot was a permanent and substantial building; that the prices paid for it by him were fair and reasonable; that there were several bids for the work, and he gave it to the lowest responsible bidders; that the old buildings were in such condition that they produced but a very small rental, and that he erected a building of such a permanent character that a benefit accrued to the heirs and those that survive them; that it will last fifty years; and connected with this testimony were statements of rents received by him.

At the trial all the beneficiaries were represented—the minors by guardians ad litem; and as Williams, the former trustee, was seeking to be relieved of the trust, and as the cestuis que trust were before the court, it had jurisdiction to hear and determine as to all matters relating to the trust; and, after Williams had been relieved, and his successors (Eastland and Barber) had been appointed, the successors would take office as the condition of the trust existed upon their coming in, and would not be subsequently heard to question the correctness of the action of the court, or its legitimate results, in the manner in which one of them here seeks to do.

The findings above referred to substantially found the facts in regard to the subject now in controversy. It is true the court in its findings stated that it was then impossible to separate the capital of the separate trusts, or to apportion the moneys due by plaintiff, or the mortgages for eighty-eight thousand dollars, between the new trustees, and by an order directed that the distribution of the money between the two trusts created by the will, and the apportionment of the two mortgages, and the settlement of all other controversies between the trust estates be reserved for further consideration and order; yet, with the facts then already found, as above stated, we do not see what was then in the way of making such a distribution as has been made by the decree of October 18, 1880, save the transactions which arose subsequent to the trial.

The appellants cannot, as between themselves and the respondents, be heard, on this appeal, to question the correctness of the expenditures on the Ketler lot, for this reason: As between the Ketlers and the Conroys, the Ketlers have the results of the expenditures, viz.: the building on their lot; if it was not a proper expenditure, or if (as they now claim) the building was of less value than the amount expended, Williams would be a necessary party to a proper adjustment of the controversy, because, if he had improperly expended the funds, the money judgments rendered against him would have to be increased by the amount improperly expended; and by omitting him from the motion for a new trial and from the appeal, the appellants have precluded themselves from going into the matter. They in effect say, as to Williams, we make no question as to the propriety of the expenditure, but, as to the respondents, we do make question; as to Williams, we have the worth of the money on our land, but as to the respondents we have not. This is not just. We see no error in the record.

Judgment and order affirmed.

I concur: Thornton, J.

SHARPSTEIN, J., Concurring.—I concur in the affirmance of the judgment and order for the reasons stated in the last paragraph of the opinion of Mr. Justice Myrick.

INGRAHAM, Respondent, v. BURTON et al., Appellants.

No. 8747; July 23, 1883.

Mortgage Foreclosure.—In Ejectment by a Mortgagee to recover the premises after due foreclosure proceedings, the mortgagor cannot defend his withholding possession on the ground of equities now set up for the first time.

APPEAL from Superior Court, San Diego County.

Conkling & Hunsaker for respondent; A. B. Hotchkiss for appellants.

ROSS, J.—It is clear that by the patent the legal title to the premises described in the complaint was vested in Maria A. Burton, Nellie Burton and Henry H. Burton. These persons subsequently mortgaged the property, the mortgage was foreclosed and by means of the foreclosure proceedings their title became vested in the plaintiff. All this was prior to the commencement of the present action, which is ejectment. The complaint is in the usual and approved form of such actions. The answers, except in so far as they contain details of the averments of the complaint, are insufficient to constitute a defense to the action. If, as is alleged in the answer of the defendant H. H. Burton, the title that was conveyed by the patent to Maria A. Burton, Nellie Burton and H. H. Burton, was conveyed to them in trust for the creditors of H. S. Burton, deceased, and that the plaintiff was cognizant of that fact at the time of his purchase, or if, as is alleged in the answer of the defendant Maria A. Burton, the property in question is a part of the estate of H. S. Burton, deceased, and that she, as his widow, is entitled to have a homestead carved out of the said property, the steps necessary to secure the rights, if any, of such creditors and the present defendants do not appear to have been taken. In this action the legal title must prevail, no such equities being set up as would control that title. Indeed, no affirmative relief whatever is sought. On the issues material to the determination of the case, the court found in favor of the plaintiff, and we cannot say the findings are unsustained by the evidence.

Judgment and order affirmed.

We concur: McKee, J.; McKinstry, J.

RICE, Appellant, v. BOYD, Respondent.

No. 8660; July 23, 1883.

Dedication.—When More Than Six Years have Run from the beginning of a public user of land up to the bringing of suit by the owner, the court is justified in inferring a dedication on the day such user began.

Dedication—Revocability.—Neither the Owner of Land nor Anyone claiming under him can recall a dedication once made and accepted, so long as the land remains in the use to which it was dedicated, although, subject to the user, the owner has the fee notwithstanding the dedication.

APPEAL from Superior Court, San Bernardino County.

Satterwhite & Curtis for appellant; W. C. Rowell for respondent.

McKEE, J.—The question in this case is, whether a strip of land about sixty feet wide on the southerly side of ten acre lot number 164 of the lands of the Southern California Association, south of Riverside, is part of a public highway.

It was admitted at the trial that the land was within the boundaries of the Jurupa ranch, that a patent to the ranch had been issued by the United States government on May 23, 1879, and that the plaintiff derived his title to the ten acre lot from the patentee. And the court found:

"1. That continuously and uninterruptedly from some time prior to February 15, 1876, until April, 1881, a road of sufficient width for the convenient use and travel of a wagon and teams was, and has been, used as a public highway, running easterly and westerly, along and near to the south side of the lot of land described in the pleadings as ten acre lot No. 164, south of Riverside, in this county, and said road was, at the commencement of this action, and during all the time complained of in the complaint, a public highway, and has never been abandoned or discontinued as such.

"2. That in April, 1881, and frequently since then, the plaintiff has interrupted the use of said road as a highway, and placed obstructions therein under claim that there did not

exist any public highway across his said premises, and that the defendant, as road overseer of the district in which the road was situated, entered upon the strip of land in controversy as part of the highway for the purpose of making needed repairs thereon, and not otherwise."

No attack is made upon the findings. The prominent fact then, as found by the court, and with which we have to deal, is user of the land as part of a public highway. It is well settled that adverse occupancy and use of land as a public highway, for a period of time equal to that prescribed by the statute of limitations for bringing ejectment, will justify the presumption of a dedication to the public: Cincinnati v. White, 6 Pet. (U. S.) 431, 8 L. Ed. 452; Onstott v. Murray, 22 Iowa, 459; Geberling v. Wunnerberg, 51 Iowa, 125, 49 N. W. 861; Reed v. Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662; San Francisco v. Scott, 4 Cal. 114; Harding v. Jasper, 14 Cal. 642. Here the user commenced on the 15th of February, 1876, was acquiesced in by the owner and enjoyed by the public, uninterruptedly, until April, 1881, and the suit was not commenced until May 15, 1882; more than six years had therefore run from the commencement of the user until the bringing of the suit, and the court was justifiable in inferring that the owner of the land had dedicated it to public use on the 16th of February, 1876.

That the owner could have made that disposition of it does not admit of question; for he had the same right to donate it to the public for a public use that he had if he wished to transfer it to an individual by grant. As a mode of transfer, one was as effectual as the other; and, when complete in itself, each passes the interest of the owner for the purposes intended. By grant, the owner parts with his title. By dedication, he abandons the land to the public for the use to which he has subjected it; and, upon acceptance by the public, the power of the owner to interfere with the use is gone as effectually as if he had transferred the title by grant. Neither he nor anyone claiming under him can revoke a grant once made and delivered, nor recall a dedication once made and accepted, so long as the land remains in the use to which it was dedicated: Trustees of Hoboken v. Hoboken, 33 N. J. L. 12, 97 Am. Dec. 696; Rees v. City of Chicago, 38 Ill. 322; Harding v. Jasper, supra. And as dedication is completed by the act of the owner

and acceptance (San Francisco v. Canavan, 42 Cal. 543), it would seem that no particular length of time or of user would be necessary to perfect the right of the public to the use. Upon that point there prevailed for a time a diversity of opinion among English judges. In Woodyer v. Hadden, 5 Taunt. 137, Mr. Justice Chambre thought no particular time was necessary for the purpose. If the act of dedication, said he, were unequivocal, it might take place immediately. Lord Kenyon held that a period of six or eight years of general use would be evidence of dedication. Lord Mansfield doubted. But the doctrine of the English cases is thus formulated by Matthews on Presumptive Evidence, pages 319, 320: "Where an intention is plainly and significantly shown from the outset, submission to the public use for six years, or even possibly for a less period, would preclude the owner of the soil from re-asserting his ancient right." And in the United States the rule is that no length of time or user is necessary, as in prescription, to perfect the right of the public: Rees v. Chicago, supra; Fisher v. Beard, 32 Iowa, 346; State v. Atherton, 16 N. H. 211; Jasper v. Harding, and San Francisco v. Canavan, supra.

The vital question is, Has dedication, as an investitive fact, been proved? If it has been, the right of the public to the use has become perfect, and it cannot be interfered with by any act of the owner, or anyone claiming under him, in perfecting his title to the soil, or in obtaining a patent from the government, or in acquiring a new title. Dedication, however, does not devest the owner of the soil of his title; he still remains the owner of the fee, subject to the use to which he has dedicated the land; and he may perfect the title which he had, or acquire any new title; but the perfection of his title, or the acquisition of a new title, is only accessory to the fee; it does not affect the use in the public. The right to that use is paramount to the title of the owner of the soil, whatever it may be, and continues until the public relinquishes the land or discontinues the use. In that event the land reverts to the owner; but until then, neither the right of the owner to the soil nor the right of the public to the use is at all affected by the statute of limitations.

Pope v. Kinman, 54 Cal. 3, is not analogous to the case in hand. That was a contest which involved the rights of the

parties to the property in controversy. Against the right asserted by the plaintiff under a patent which had been issued to him by the government of the United States, the defendants claimed adverse right under the statute of limitations; but their claim was held to be unfounded, because the statutory time necessary to establish their claim had not run from the issuance of the patent. No such question is involved in this case. We see no error in the record.

Judgment affirmed.

I concur: Ross, J.

I concur in the judgment: McKinstry, J.

LATSON et al., Appellants, v. NELSON et al., Respondents.

No. 8414; July 24, 1883.

Mechanics' Liens.—The Constitution of 1879 (Art. 20, Sec. 15), as to mechanics' liens, was intended to be merely declaratory of the law in that regard theretofore in force as construed by decisions of the supreme court then extant.

Mechanics' Liens—Constitution of 1879.—The mechanics' lien law in force at the time of the enactment of the constitution of 1879, as construed by decisions of the supreme court extant at the time, gave no warrant to laborers and materialmen to charge the building with liens exceeding in amount the balance of the contract price remaining unpaid when the notice of lien was given.[1]

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[1] **Cited** and approved in Wiggins v. Bridge, 70 Cal. 439, 11 Pac. 754, where the lien of the materialman is declared to depend for its existence on there being an indebtedness by the owner to the contractor at the time of, or subsequently to, the filing of the notice.

Cited in Whittier v. Hollister, 64 Cal. 284, 30 Pac. 818, where it is stated by the court, without further comment, to dispose of the appeal.

Cited in O'Donnell v. Kramer, 65 Cal. 353, 4 Pac. 204, and there followed, the action being by a creditor of a contractor who had abandoned the work after partial performance.

Cited in Wilson v. Barnard, 67 Cal. 423, 7 Pac. 845, as authority for saying that "the owner cannot be charged beyond the contract price."

Cited in Kellogg v. Howes, 81 Cal. 179, 6 L. R. A. 588, 22 Pac. 509, and, though questioned, in some aspects affirmed as to its doctrine that where a valid contract existed between the owner and contractor,

Mechanics' Liens—Constitutional Law.—The legislature, in amending section 1183, Code of Civil Procedure, as to mechanics' liens in assumed compliance with the mandate of the constitution of 1879, could not validly extend the law beyond what the constitution intended.

APPEAL from Superior Court, San Francisco.

W. H. H. Hart for appellants; Chickering & Thomas for respondents.

MYRICK, J.—The plaintiffs claim a lien on certain premises for the value of materials furnished for, and used in, the construction of a building erected on the premises. The complaint avers that the defendant Nelson, as contractor, was erecting the building for the defendant Thayer, and as such contractor purchased the materials and agreed to pay the plaintiffs therefor. The defendant Thayer is not connected with the purchase of the materials, other than is claimed to result from the contract for the building and as owner of the premises. It is not alleged that any amount is due or is to come due or payable from defendant Thayer to defendant Nelson, on the contract, or in any other way. The plaintiffs assert that under article 20, section 15, of the constitution of 1879, and section 1183, Code of Civil Procedure, as amended in 1880, they have a lien, independent of any contract or obligation existing between the original parties.

The act of March 30, 1868, provided that persons performing labor upon, or furnishing materials for, any building, etc.,

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the former could not be made liable to subcontractors beyond the amount fixed therein.

Cited and approved in Kellogg v. Howes, 81 Cal. 175, 6 L. R. A. 588, 22 Pac. 509, as bearing on the point that, whatever rights the lien owner might have had previously, the statute under consideration in the cited case limited them from the time of its enactment.

Cited with approval in Hoffman-Marks Co. v. Spires, 154 Cal. 116, 97 Pac. 154, holding the constitutional principle underlying the mechanics' lien law to be that the owner, having agreed to pay a certain price by his contract, and having complied with the terms of the latter, is not liable for more.

Cited and approved in Butler v. Ug Chung, 160 Cal. 438, 117 Pac. 514, where the court say that the filing of the contract merely substitutes the lien claimants for the original contractors, on whose having a money demand against the owner depends the right to enforce the liens.

should have a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner or his agent; and for the purposes of the act the contractor or other person having charge of the construction was declared to be the agent of the owner. In construing this act, this court held, in Renton v. Conley, 49 Cal. 185, that the materialmen and laborers could not charge the buildings with liens exceeding the balance of the contract price remaining unpaid when notice of the lien was given.

In framing the constitution of 1879, the convention had before it the statute of 1868 and the decision of this court above referred to, with others of similar import; and declared, upon the subject of liens of this character, article 20, section 15: "Mechanics, materialmen, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

In obedience to this mandate, the legislature, in amending section 1183, Code of Civil Procedure (which section, previous to the amendment, was in substance the same as the act of 1868 as above stated), in effect repeated the provisions of the constitution; but added thereto the following: "This lien shall not be affected by the fact that no money is due or to become due on any contract made by the owner with any other party."

It is under this last clause that the plaintiffs claim their lien.

In the former constitution there was no provision in reference to liens in favor of materialmen and laborers; the subject was left to the wisdom of the legislature; but the convention of 1879 saw fit to insert in the new constitution the clause above quoted. In doing so, the former statute being before the convention, with the construction placed upon it by this court, we must presume that the convention intended to continue and make permanent the statute theretofore existing, with the construction it had received; and that the convention did not intend to enlarge, but to fix. The last clause of section 1183, Code of Civil Procedure (amendment of 1880), would operate very much to enlarge and extend the provision of the

constitution; indeed, it was contended for the plaintiffs, on the oral argument, that an owner of property could make no contract with a contractor which would relieve him of any amount of labor or materials the contractor might see fit to have performed or placed on the building under construction or repair; that if A, an owner of a lot, wished to construct a house, say of the value and cost of five thousand dollars, and should make a contract to that end with B, materialmen and laborers employed by B could place ten thousand dollars' worth of materials and labor on the building, and have liens therefor (provided no fraud or collusion intervened), and that the owner's only safeguard was, either to purchase and employ in person, or take security from the contractor. We do not think the convention intended that result; nor do we think the legislature, in amending section 1183, Code of Civil Procedure, could go beyond the provision of the constitution. If A shall contract to pay five thousand dollars to B for the construction of a building, the legislature may secure the distribution of the agreed sum among the persons furnishing materials and performing labor; but this authority does not necessarily include the forcing of an obligation upon A which he never contemplated. It is said that the owner has full security in the right to require a bond of the contractor that no liens shall be created. So far as that is any argument, it may with equal force be said that the materialman may require payment or security of the contractor before parting with his goods.

Another provision of the constitution, article 1, section 1, declares that all men have certain inalienable rights, among which are those of acquiring, possessing and protecting property. This provision would lose much of its force if a man of limited means, having a lot and desiring to build a home, while contracting within his means, could have cast upon his land burdens beyond his necessities, wishes and pecuniary ability.

The demurrer was properly sustained. The judgment is affirmed.

I concur: Ross, J.

We concur in the judgment: McKinstry, J.; Thornton, J.

HAMLIN, Respondent, v. HIS CREDITORS, Appellants.

No. 8874; August 16, 1883.

Appeal—Former Judgment.—An Appeal from a Final Judgment does not bring up the finality of a former judgment in the cause, the vacating of which might have been appealed from at the time but was not.

Appeal—Amendments—Insolvents' Schedules.—The rule that, except where there has been an abuse of discretion, the supreme court will not disturb an order of the court below granting or denying leave to amend in civil proceedings, applies to the petition and schedules of an insolvent.

APPEAL from Superior Court, Sutter County.

Bliss & Singer for respondent; Barney & Sanborn for appellants.

SHARPSTEIN, J.—Conceding that the refusal of the court to grant respondent a final discharge from his debts constituted a final judgment, and that it does not appear that there were sufficient grounds for vacating it, the order vacating it was simply erroneous, and reviewable only on appeal. But it was not appealed from, and has not been vacated. And until vacated or reversed it is final. It cannot be reviewed here except on a direct appeal from it. The judgment subsequently entered is appealed from, but that does not bring the order made after the former judgment up for review.

The only alleged errors which can be considered on this appeal are those based on the leave granted to respondent to amend his petition and schedules. But we think the well-settled rule that this court will not disturb an order granting or denying leave to amend pleadings and other proceedings in civil cases, except where there has been an abuse of discretion, applies to cases of insolvency: Bennett v. His Creditors, 22 Cal. 42; Wilson v. His Creditors, 32 Cal. 406. And we think with the learned judge below, "that upon principle and authority the pleadings and proceedings in insolvency may be amended when the court, in the exercise of a sound discretion, is of the opinion that such amendments should be

permitted, and when by granting such permission, the rights of creditors remain unaffected, and bona fides on the part of the insolvent is clearly shown."

Judgment affirmed.

I concur: Myriek, J.

THORNTON, J.— I find no error in the record, and therefore concur.

PEOPLE, Respondent, v. SMITH, Appellant.

No. 10,811; August 29, 1883.

Appeal.—An Appeal from a Selected Portion of a Charge to the jury, when the charge as a whole corrects any possible error in particular parts, is not tenable.

Trial.—Some Especial Point in a Charge cannot Aggrieve a party, when the jury is told that they are the sole judges of the facts and the value of the testimony.

APPEAL from Superior Court, San Francisco.

Attorney General for respondent; H. Eickhoff and G. Strauss for appellant.

THORNTON, J.—While the portions of the charge referred to on the argument as contravening the law would be erroneous standing alone and not qualified by other portions of the charge, yet, as the jury were told by the court that they were "the sole judges of the facts and the value of the testimony," we cannot hold that there was any error in the charge for which the judgment should be reversed. Taking the whole charge together, we cannot perceive that the jury were misdirected or their functions in any manner invaded by the court. The court did not in its comments on the credit of the witnesses go beyond what is allowable, when the jury were at the same time directed that they were the sole judges of the facts and of the value of the testimony.

Judgment affirmed.

We concur: Ross, J.; McKee, J.; Myrick, J.

PEOPLE, Respondent, v. WARD, Appellant.

No. 10,804; August 28, 1883.

Appeal—Indefinite Transcript—Charge to Jury.—An appeal from points in a charge to a jury is not to be entertained upon a transcript containing no copy of the charge, but showing only that one had been given, an oral one, and having in it nothing to show any exceptions taken.

APPEAL from Superior Court, San Francisco.

Attorney General for respondent; Darwin & Murphy for appellant.

By the COURT.—The only points presented on behalf of the defendant are two objections to the charge of the court. It appears from the transcript that an oral charge was given, but it does not appear that any objection was made or exception taken thereto; neither is any charge contained in the transcript. Under such circumstances we cannot see what possible error could be suggested, or why the appeal was taken, and time required to be consumed by this court in its examination.

Judgment and order affirmed.

CARROLL, Respondent, v. BELDEN, Appellant.

No. 8636; August 29, 1883.

Appeal—Conflicting Evidence.—The Trial Court's Finding upon a substantial conflict of evidence as to the understanding of the transaction had by the parties is not to be disturbed.

APPEAL from Superior Court, Yolo County.

W. B. Treadwell for respondent; Roche & Desbeck for appellant.

By the COURT.—There is a substantial conflict in the evidence regarding the understanding of the parties as to the transactions involved in this case. Therefore we will not disturb the findings of the court below.

Judgment and order affirmed.

PEOPLE, Respondent, v. HURTADO, Appellant.

No. 10,867; September 18, 1883.

Appeal.—An Appeal on Points Disposed of in a Previous Appeal of the same case will not be entertained.

Homicide.—A Verdict of "Guilty of Murder in the First Degree as charged" is valid.

Indictment.—Prosecution upon Information, Instead of upon Indictment, does not violate the constitution of the United States.

APPEAL from Superior Court, Sacramento County.

Attorney General for respondent; McFarlane & Jones for appellant.

By the COURT.—The ruling of the court overruling the objections of defendant to the order fixing the day of execution is not appealable.

Every question urged on the argument of this appeal was disposed of on the former appeal. Moreover, the verdict of the jury was sufficient and regular: People v. Welch, 49 Cal. 174. And further, the provision of the constitution of this state as to the prosecution of criminal offenses by information (sec. 8, art. 1) is not in conflict with the constitution of the United States: Kalloch v. Superior Court of the City and County of San Francisco, 56 Cal. 229.

The order fixing the day for the execution of the judgment is affirmed.

PEOPLE, Respondent, v. AH COON and AH LEE, Appellants.

No. 10,838; September 27, 1883.

Homicide.—If a Physician, Immediately After a Stabbing Affray, has examined the victim, though not thoroughly, and testified that one of the wounds was dangerous and there was a probability of its being fatal, this, together with the fact that the victim died within four days after receiving the wounds, would justify a jury in concluding that these wounds caused the death.

APPEAL from Superior Court, Butte County.

Attorney General for respondent; John C. Gray, L. I. Mowry and Rearden & Freer for appellants.

MYRICK, J.—The information in this case accused the defendants of the crime of murder. The jury returned a verdict of guilty of murder in the first degree. On this appeal, two points are presented, viz.:

1. That there was not sufficient evidence that the deceased died of the wounds inflicted, to justify the verdict. Evidence was given that the defendant stabbed the deceased; a physician was called, who testified that he was not able to say whether the wounds were mortal or not, as he did not make a thorough examination, but that one of the wounds was dangerous, and there was a probability of its being fatal. We think this evidence, in connection with the fact that within four days the man died, was sufficient to justify the jury in arriving at the conclusion that he died of the wounds.

2. The transcript recites that, after argument by counsel, the court "fully instructed the jury as to all the material points of law in the case, and as to what verdicts they could find"; they retired; they returned into court, and the following occurred:

Juror: "There are some of the jurors who are not thoroughly satisfied as to the charge of the court in regard to their position in bringing in a verdict, and they want further instructions."

The Court: "You can bring in a verdict of murder of the first or murder of the second degree—"

Foreman (interrupting): "That was the instruction we wanted."

The Court: "You can bring in either."

Foreman: "That is all we wished."

The Court added: "If, from the evidence in the case, you find, and you are entirely satisfied, beyond a reasonable doubt, that they are the persons who killed, or aided and assisted in the killing of the deceased, at the time and in the manner charged in the information, and that they lay in wait to accomplish such killing, then you should find the defendants guilty of murder of the first degree, unless there are circumstances appearing in the evidence to reduce it below that degree."

It is contended that these instructions in effect instructed the jury to convict the defendants of murder, leaving to the discretion of the jurymen only the question of degree. After the court had "fully instructed the jury as to all the material points of law in the case, and as to what verdict they could find," we see no ground for this contention to rest upon.

Judgment and order affirmed.

We concur: Thornton, J.; Ross, J.; McKinstry, J.; McKee, J.

PEOPLE, Respondent, v. WOOD, Appellant.

No. 10,743; September 28, 1883.

Larceny—Evidence of Similar Transactions.—In a prosecution for larceny where, under the case as made out, the prosecuting witness had transferred money to the defendant, it was error to admit evidence of transactions of a similar nature had by the defendant with other persons, which might tend to show this to be a familiar dishonest method with him but could not show that the understanding of the parties in this particular transaction was not that the property should pass as well as the possession.[1]

[1] Cited in People v. Cunningham, 66 Cal. 672, 4 Pac. 1144, and distinguished in respect of the absence, in the case cited, of connection in time, place, circumstances or intent between the offense charged and the one the evidence tended to prove. But see same case, page 676 (6 Pac. 846), in a dissenting opinion.

Larceny—Instructions—Hypothetical Case.—In a prosecution for larceny it is error to give an instruction based on a hypothesis which assumes facts, so far as they go, like those proved at the trial, particularly when an instruction preceding contained such words as "this whole case turns upon the intent to steal at the time the money was paid."

APPEAL from Superior Court, San Francisco.

Attorney General for respondent; Leander Quint for appellant.

SHARPSTEIN, J.—The exception to the rulings of the court, on the defendant's objections to the introduction of evidence of other independent transactions, between him and persons other than the prosecuting witness, similar in character to the one which constitutes the basis of the charge on which the defendant was tried and convicted, merit careful consideration.

The defendant was charged with larceny. Whether he was guilty depended on the character of a transaction between him and the prosecuting witness, by which the latter transferred the possession of a certain sum of money to the former. If it was the understanding of the parties that the property in the money, as well as the possession of it, should pass, the fraudulent acquisition and subsequent use of it would not constitute larceny. Proof that the defendant had obtained money from other persons by means similar to those which he employed to obtain it from the prosecuting witness might tend to show that the defendant was a great knave, but would not tend to show that he did not obtain the property in the money, as well as the possession of it, by fraudulent means. The question is, Was it the understanding that the title to the money should pass? Was it borrowed, or received on deposit for a special purpose? This depends on the understanding of the parties at the time of the actual transfer. Could the defendant be permitted to prove similar transactions between him and other persons, in which it was understood that the title as well as the possession of the money passed? The court below very properly held that he could not. The understanding between him and persons other than the prosecuting witness, from whom he obtained money by means exactly similar

to those resorted to for obtaining it from the prosecuting witness, would not in the least degree tend to prove what was the understanding between the defendant and the prosecuting witness. If the understanding was the same in each case, and was such as to make the obtaining and use of the money in each case larceny, it would simply result that a defendant might be proved to have committed a series of larcenies, although charged with the commission of only one. For obvious reasons the law will not permit that to be done. "To admit evidence of such collateral acts would be to oppress the party implicated by trying him on a case as to which he has no notice to prepare, and sometimes by prejudicing the jury against him by publishing offenses, of which, even if guilty, he may have long since repented, or may have long since been condoned. Trials would, by this process, be injuriously prolonged, the real issue obscured, and the verdicts taken on side issues": 1 Wharton on Evidence, 29.

The issue in this case is whether the defendant obtained money from the prosecuting witness under such circumstances as would constitute the subsequent use of it by defendant larceny. And it was inadmissible to put in evidence the fact that he obtained money from others under similar circumstances which he used as he did that obtained from the prosecuting witness. The rule which makes the introduction of such evidence inadmissible has been recognized and applied in numerous cases. In Commonwealth v. Jackson, 132 Mass. 16, the defendant was tried and convicted on a charge of obtaining money and property by false pretenses; that is, by "falsely pretending and asserting to one John Parker that a certain horse was sound and kind, with the knowledge that such assertion was false and with intent to defraud the said Parker by inducing him to part with his money and other valuable property; and for actually defrauding him." At the trial the government was permitted to introduce evidence of similar transactions between the defendant and other persons, "solely for the purpose of showing the intent with which the defendant made the sale of the horse to Parker as charged in the indictment." This was held to be error. The court says: "The other statements made by defendant at other times as to other animals might have been false, while these were not. The transaction formed no part of a single scheme or plan

any more than the various robberies of a thief. They were entered upon as from time to time he might succeed in entrapping credulous or unwary persons." In Regina v. Holt, 8 Cox C. C. 411, the prisoner was charged with obtaining a specific sum of money from one Hirst by false pretenses, i. e., by falsely representing that he was authorized by his master to receive it. Evidence was admitted of his having obtained another sum of money from another person by a similar false pretense. On appeal it was held that such evidence was not admissible for the purpose of proving the intent of the prisoner when he committed the act charged in the indictment, and the conviction was quashed.

In Cole v. Commonwealth, 5 Gratt. (Va.) 696, the prisoner was tried on a charge of advising the slaves of E. L. to escape. Evidence of his having also advised the slave of S. A. to escape was admitted. For this error alone the judgment was reversed.

Commonwealth v. Tuckerman, 10 Gray (Mass.), 173, is not a parallel case. The defendant was indicted for embezzling the money of a corporation while acting as its treasurer. He made a statement in writing by which it appeared that while acting in the same capacity he had from time to time converted to his own use other moneys than those specified in the indictment, but belonging to the same corporation. The entire statement was admitted in evidence. No attempt was made to introduce evidence of the embezzlement by him of money belonging to any other person or corporation than the one named in the indictment. On the other hand, "all the proof which was offered in relation to transactions not intimately and directly connected with the particular accusation against the defendant, or with the evidence or in necessary explanation of the evidence, adduced to establish it, was carefully rejected."

In Commonwealth v. Merriam, 14 Pick. (Mass.) 519, 25 Am. Dec. 420, where a party was tried upon an indictment for the crime of adultery, evidence of three instances of improper familiarity between the prisoner and the female named in the indictment was admitted. But no attempt was made to prove any such familiarity between him and females other than the one so named.

In cases where it is necessary to prove scienter or intent, or of negativing accident, evidence of overt acts of the same class as that under investigation is admissible within certain well-defined limits. On the trial of a charge of holding or circulating forged paper or of receiving stolen goods, it being incumbent on the prosecution to prove that the holder or utterer of the forged paper knew it to be such, or that the party charged with receiving stolen goods knew that they had been stolen, evidence of the possession or utterance of other forged paper, or of receiving other stolen goods is admissible. "This is an exception to the general rule of evidence": Per Shaw, J., in Commonwealth v. Stone, 4 Met. (Mass.) 42.

"It may well be doubted whether the exception to the general rule of law ought to be further extended": Per Devens, J., in Commonwealth v. Jackson, supra.

In Regina v. Oddy, 15 Cox C. C. 210, Lord Campbell remarks as to the reception of evidence of other occasions where base coin or counterfeit bills are charged to have been knowingly uttered: "I have always thought that those decisions go a great way, and I am by no means inclined to apply them to the criminal law generally."

Where the proof of a single overt act might leave reasonable doubt whether it was intentional or accidental, evidence of other acts of similar character has sometimes been admitted. But in the case at bar no such question could arise. Neither is there any question as to the knowledge or intention of the defendant. The only questions which the jury had to determine were: 1. Did the defendant fraudulently obtain money from the prosecuting witness? 2. If he did, was it received on deposit for a special purpose, and unlawfully converted to his own use?

These questions being answered in the affirmative, the law would supply everything else necessary for the conviction of the defendant. And if not answered in the affirmative, proof of a thousand similar transactions with other persons would not justify his conviction. There was therefore no necessity nor occasion for the introduction of evidence which is admissible only in cases where the commission of the act charged does not necessarily imply a criminal intent. Nothing short of necessity will justify a resort to such evidence.

"It is a dangerous species of evidence, not only because it requires a defendant to meet and explain other acts than those charged against him, and for which he is on trial, but, also, it leads the jury to violate the great principle that a party is not to be convicted of one crime by proof that he has been guilty of another": Commonwealth v. Shepard, 1 Allen (Mass.), 575.

Another exception to which our attention has been directed is to that portion of the charge in which the court said: "This whole case, gentlemen of the jury, turns upon the intent to steal at the time the money was paid. . . . . If A parts with his money to B under false representations made by B for the express purpose of defrauding A, and [B makes at such time his promissory note payable to A] sometime after date, B is criminally liable immediately upon the consummation of the agreement, and it is no defense that the time has not arrived at which the note was to be paid."

It is true that, in other portions of the charge, the court referred to the distinction between larceny and obtaining property or money under false representations, based upon the intent of the party injured to part with the possession only in the one case, and to transfer his property in the money or goods in the other. But the particular instruction is based upon a hypothesis which assumes facts, so far as they go, like those proved at the trial. It, in effect, informs the jury that if the prosecuting witness "parted with his money," taking a promissory note therefor, by the terms whereof the money was to be repaid with interest—the prosecuting witness having been induced to enter into such an arrangement by "false representations" of defendant—the defendant was guilty of larceny at the moment he received the money. And this was preceded by an instruction that the "whole case" turned upon the intent of the defendant to steal (or not to steal) at the time the money was paid. Under the circumstances we cannot say the charge did not mislead the jury. Its natural meaning is, if A is induced to part with his money to B upon B's promise to repay it at a future day, A being induced to lend the money by false representations, B is guilty of larceny, although the time has not arrived at which the money was to be repaid. A promissory note is a promise in writing to pay. The jury may have understood the instruc-

tion to be what its language imports: If A is induced by the fraudulent representations of B to lend, or "part with" his money, and to take for it B's promise to repay it, B is guilty of larceny. And further, that the whole case turned on B's intent never to pay the note which, by fraudulent representations, he had induced A to receive.

Judgment and order reversed and cause remanded for a new trial.

We concur: McKinstry, J.: Ross, J.

I concur in the judgment: McKee, J.

GARNIER, Respondent, v. GRIMAUD et al., Appellants.

No. 9148; October 12, 1883.

New Trial—Discretion of Court.—A Motion for a New Trial is addressed to the sound discretion of the trial court, and where that discretion has not been abused the order upon that motion will not be disturbed.

Appeal.—With No Valid Bill of Exceptions Before It, or valid statement of the evidence, the appellate court must presume correctness on the part of the court below in granting a new trial.

APPEAL from Superior Court, Los Angeles County.

H. Allen and John Robarts for respondent; Glassell, Smith & Patton and J. Brosseau for appellants.

By the COURT.—This is an appeal from an order granting a new trial. Such a motion is addressed to the sound discretion of the court below, and this court will never interfere with the ruling of the trial court unless there is an abuse of discretion. In this case we see no such abuse. The motion is made and was heard on the minutes of the court. No statement setting forth the evidence as required by law (Code Civ. Proc., sec. 661) was made, and we cannot know on what evidence the court below acted. The bill of exceptions is not such a document as the statute requires to set forth this

evidence. We must presume, then, that the court below ruled correctly.

As to the notice of intention to move for a new trial, we are of opinion that the particulars of the insufficiency of the evidence to sustain the decision of the court are sufficiently set forth in the notice. Further, we are of opinion that the court might well have granted the new trial on the affidavits presented.

The order is affirmed.

PEOPLE, Respondent, v. PATRICK SMITH, Appellant.

No. 10,849; October 18, 1883.

Exceptions.—Any Error of the Court as Found in the Charge to the jury as taken down by the court reporter is available on appeal without being excepted to or embodied in a bill of exceptions.

Criminal Law.—A Verdict of "Guilty as Charged," etc., is sufficient.

APPEAL from Superior Court, San Francisco County.

Attorney General for respondent; Darwin & Murphy for appellant.

By the COURT.—The charge to the jury was taken down by the reporter; "the report" of the charge forms part of the record and is deemed excepted to: Pen. Code, sec. 1176. The section reads: "When written charges have been presented, given or refused, or when the charges have been taken down by the reporter, the question presented in said charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the indorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions." In some copies of the statute the "or" is erroneously printed "of," so that the clause reads "but the written charges of the report, with the indorsements," etc.

Even, however, if the law so read, the meaning would be the same.

The verdict "guilty as charged," is sufficient: People v. Whitley, No. 10,834, opinion filed October 3, 1883.

There is no material error in the charge.

Judgment and order affirmed.

FOYE, Respondent, v. SIMON et al., Appellants.

No. 7559; October 22, 1883.

Venue—Right of Nonresident to Change.—A person sued in a state court in a county other than that of his residence is, on proper application being made, entitled to a change of venue.

APPEAL from Superior Court, Fresno County.

Tupper & Tupper for respondent; Jno. C. Burch for appellants.

By the COURT.—The defendants were entitled to an order changing the place of trial to the city and county of San Francisco, their place of residence: Cooke v. Pendergast, 9 Pac. C. L. J. 755.

Order reversed and cause remanded, with instruction that an order be made, transferring the cause to the superior court of the city and county of San Francisco.

COUNTY OF MERCED v. TURNER et al.

No. 8239; October 23, 1883.

Bond—Execution and Delivery.—When the execution of a bond sued upon is not denied in the answer, the question of delivery is not before the court on appeal.

By the COURT.—We are of opinion that inasmuch as the execution of the bond sued on is not denied in the answer, the question as to delivery is not before us in this cause.

We find no error in the record and the order is affirmed.

Judgment affirmed.

Ex Parte WILLIAM A. MESS on Habeas Corpus.

No. 10,904; November 3, 1883.

Habeas Corpus.—The Passing of Sentence Within Two Days after conviction does not entitle the convicted person to discharge on habeas corpus.

Criminal Law.—The Imposing of Sentence Within Two Days After judgment of conviction is an irregularity and contrary to section 1191 of the Penal Code, but the question should be raised by direct appeal from the court's action, rather than by habeas corpus.

Clara Foltz and F. A. Hornblower for petitioner; Alfred Clark contra.

THORNTON, J.—The defendant was, on an information regularly filed, convicted in the superior court of the city and county of San Francisco of the crime of forgery. The verdict was rendered on the 25th of October, 1883, and at the same time the 27th of the same month, at 10 o'clock, A. M., was set for pronouncing judgment. On that day the defendant, with his attorney, appeared in court; and upon his being asked why judgment should not be pronounced against him, he moved for a continuance of sentence for three weeks, which motion was denied. He also moved for a new trial, on the ground of newly discovered evidence. The court also denied this motion, and, as recited in the entry, "the defendant showing no legal cause why judgment should not be pronounced against him," the court proceeded to pronounce judgment of imprisonment in the state prison at San Quentin for seven years. The defendant, as appears by the return of the warden of the prison, was held in custody by him under an order of commitment from the superior court above named, regular on its face, issued upon this judgment. It is now contended that the judgment and process under which the defendant is detained are void, for the reason that the period of two days was not allowed to elapse after the verdict of guilty was rendered before judgment was pronounced, and section 1191, Penal Code, is cited and relied on.

This may have been an irregularity for which the judgment should have been reversed on appeal, but the judgment and

process issued upon it are not void. Section 1191, above referred to, lays down a rule of procedure, and in general it should be observed; but I cannot think that it was ever intended that a violation of it should render the judgment so pronounced of no effect. The court had jurisdiction of the subject matter and the defendant, and was not deprived of it by a judgment the defect in which, if there was any, was nothing beyond nonadherence to a prescribed rule of procedure, and not such a material defect as made the proceeding illegal and void. See Ex parte Gibson, 31 Cal. 625, 626, 91 Am. Dec. 546, where the distinction between irregularity and illegality is pointed out.

I will add here that I do not wish to be understood as holding that the pronouncing of judgment on the 27th of October was erroneous; I only intend to say that the action of the court, if defective at all, was only error, and not without its jurisdiction.

The prisoner must be remanded to the custody of the warden of the state prison at San Quentin, and it is so ordered.

HART v. TIBBETTS.

No. 9625; November 5, 1883.

Appeal.—With an Unauthenticated Statement of a Motion for a new trial and with no point made on the judgment-roll there is nothing before the court.

By the COURT.—The statement on motion for a new trial is not authenticated in any way, and no point is made on the judgment-roll. There is, therefore, no point presented that we can consider.

Judgment and order affirmed.

FORBES, Petitioner, v. COUNTY OF EL DORADO, and THOMAS HARDIE, A. A. BAYLEY, and SETH LOVELESS, Constituting THE BOARD OF SUPERVISORS of Said County, and THOMAS HARDIE, Chairman of the BOARD OF SUPERVISORS of Said County, E. W. WITMER, Auditor, and GEORGE BURNHAM, Treasurer of the County of El Dorado, Constituting Ex Officio THE BOARD OF RAILROAD COMMISSIONERS of Said County, Respondents.

No. 8705; November 16, 1883.

Pleading—Verifications—Execution of Assignments.—Section 447 of the Code of Civil Procedure, in relation to pleadings, does not make invalid an unverified answer denying the genuineness and due execution of an assignment, but rather of an instrument that may be assigned.

Pleading—Verification—Execution of Assignment.—Under section 447 of the Code of Civil Procedure it is not essential that a defendant swear to his denial of the genuineness and due execution of the assignment of an instrument, when the complaint contains no copy of the instrument and the assignment.

Pleading.—A Denial on Information and Belief is not Good when the reference is to matters of which the defendant must have knowledge, but the court cannot assume a knowledge on the part of the defendant that at the time of the institution of the action the plaintiff was owner of the instrument sued upon.[1]

McKINSTRY, J.—This is an original proceeding in the supreme court, and the plaintiff has moved for judgment upon the complaint and answer.

The petition avers that the petitioner is the "owner and holder" of certain railroad bonds "issued under the act of March 28, 1863, with the coupons attached, assigned to him by an indorsement printed and written on the back of said bonds, signed by the president and secretary of the railroad company." To this the answer is: "To the allegation [reciting it] said respondent, answering, says that it [the board of supervisors] has no information or belief on the subject suffi-

[1] Cited in Pryce v. Jordan, 69 Cal. 572, 11 Pac. 185, by Ross, J., dissenting from the majority opinion that a plaintiff might be presumed to be owner of the note sued upon.

cient to enable it to answer said allegation, and therefore on that ground denies that the said bonds or any of them were assigned to said petitioner, or that he was, at the commencement of this action, the owner or holder of them or any of them."

It is contended by petitioner that the genuineness and due execution of the assignment can be denied only by verified answer: Code Civ. Proc., sec. 447. To this there are two replies: First, a copy of the assignment is not set forth in the complaint, nor are copies of the bonds; second, section 447 of the Code of Civil Procedure does not relate to assignments, but to instruments which may be assigned. Whatever the effect of the payment of interest to plaintiff, as evidence, the allegations in the petition of such payments, undenied, did not relieve the plaintiff of the necessity of averring that he was the owner and holder of the bonds. It is further urged by counsel for petitioner that there is no denial because the answer does not in express terms deny that an indorsement to him, printed and written on the bonds, was signed by the president and secretary of the railroad company. But the answer avers that the respondent has no information or belief as to such indorsement or signatures, or that plaintiff is the owner or holder of any of the bonds, and denies, therefore, that any of the said bonds were assigned to the petitioner, or that he is the owner or holder of any of them.

The last clause of section 6 of the act of 1863 provides that the bonds delivered to the railroad company may be transferred "by said company" by written or printed transfer upon the back thereof, signed by the president and secretary, etc. Unless the word "assigned" is the equivalent of "transferred," the petitioner does not allege that the bonds were transferred to him by written and printed transfer. But, assuming the words to mean the same thing, the complaint would have been sufficient if it had alleged that the bonds were assigned by the railroad company. The legal implication would be that they were assigned in the only way that they could be assigned under the statute. The pleadable fact is the assignment and the assignment is denied. Moreover, the statute only limits the mode of assignment by the railroad company. After they were indorsed by the company they could pass from hand to hand by simple delivery, in accord-

ance with a custom recognized by many adjudications relative to such instruments. Hence the plaintiff added that he was the owner and holder when the suit was commenced. The allegation that the bonds were assigned to him by the railroad company would not have been sufficient. It would show that he was once the owner, but the rule that a status or condition which existed in the past is presumed to continue is a rule of evidence, not of pleading. It would not appear but that he had sold and delivered the bonds to a third person. The petitioner very properly added, therefore, that when he applied for the writ of mandate he continued to be the owner and holder of the bonds under the assignment. This last averment is distinctly denied by the answer.

It has been held that where the fact alleged is one whose existence or nonexistence must be known to a party a denial for want of information or belief is not good. But we cannot assume that the defendant must have known that plaintiff was the owner and holder of any bonds when the present proceedings were instituted.

It is not necessary to examine the pleadings further. If plaintiff was not the legal owner of the bonds when the writ was applied for he is not entitled to the mandate.

The plaintiff's motion for judgment on the pleadings is denied.

We concur: Ross, J.; McKee, J.

LAWRENCE v. NUNAN.

No. 7693; November 16, 1883.

Sale—Change of Possession.—In Case of Conflicting Evidence as to Change of Possession the Findings of the trial court will not be inquired into on appeal if there was sufficient evidence to support them.

By the COURT.—The question involved in this case is, whether, upon the sale of the property from Watkins to Bagnasco, there was an actual and continued change of pos-

session, within the meaning and intent of the statute. The evidence upon that subject was conflicting, but there was sufficient to sustain the finding.

Judgment and order affirmed.

WINANS, Respondent, v. SIERRA LUMBER COMPANY, Appellant.*

No. 8900; November 26, 1883.

Damages—Unintelligible Instruction.—In the trial of an action founded on the alleged breach of a contract, an instruction that sets forth the measure of damages in unintelligible language is error.

APPEAL from Superior Court, Tehama County.

Chadbourne and Ellison for respondent; Chipman & Garter for appellant.

ROSS, J.—The plaintiff sued the defendant for breach of a contract alleged to have been made between them in March, 1881, in respect to the manufacture of lumber. The complaint charges that at the time stated the defendant was the owner of two steam sawmills, known as the Champion and Yellow Jacket mills, and of a large quantity of timber lands in the vicinity of the mills—all in Tehama county—together with a lumber yard and planing-mill, and also a water flume, extending from the Champion Mill to the lumber yard and planing-mill, and was also the owner of a large amount of other property, used in and about the manufacture of lumber. That on or about the 15th of March, 1881, defendant agreed to furnish to plaintiff, to be used by him during the lumbering season of 1881, in manufacturing lumber from the defendant's lands, the aforesaid mills and flume, sixty head of oxen, six horses, all the trucks, chains, etc., pertaining to the mills, all the running gear for necessary tram-cars, sufficient strap iron and nails to build a strap iron tramway from the

*For subsequent opinion in bank, see 66 Cal. 61, 4 Pac. 952.

Champion to the Yellow Jacket Mill, and all other property either necessary or convenient for the purpose of manufacturing lumber. The defendant also agreed to furnish to plaintiff, delivered at the town of Red Bluff, a locomotive engine of a certain stated capacity, suitable and proper to be run and operated upon the strap iron tramway to be built by the plaintiff under the contract—plaintiff agreeing to build a strap iron tramway from the Champion to the Yellow Jacket Mill at his own cost; to operate and use the tramway, mills, flume and milling property during the lumbering season of the year 1881, for the purpose of manufacturing lumber, which plaintiff agreed to do, and to deliver to the defendant—defendant agreeing to pay plaintiff for all lumber manufactured at the said mills during the season of 1881 and delivered at the said yard, nine dollars per thousand feet, and for all lumber so manufactured and remaining at the mills on the 1st of December, 1881, eight dollars per thousand feet, and that at the expiration of the season the plaintiff to deliver the possession of all the property, including the tramway, to the defendant. The complaint then charges full performance of the contract on the part of the plaintiff; that the defendant failed and neglected to furnish the locomotive engine it agreed to furnish; that the engine it did furnish the plaintiff was so made and constructed as that it could not be successfully used on the tramway the plaintiff agreed to, and did, construct; that plaintiff objected to the engine furnished at first and during all the time of its use, and that although often notified that the engine furnished was unsuitable for the tramway and would not work thereon, defendant neglected and refused to furnish one that was suitable, as it agreed to do. That during the entire lumbering season of 1881, the plaintiff made every reasonable effort to successfully use the engine furnished, but by reason of its defective construction and consequent failure to work properly, the plaintiff was prevented from manufacturing at least three and one-half million feet of lumber that he would have manufactured had defendant furnished plaintiff with an engine in accordance with the contract, and that by reason of defendant's failure in that regard the plaintiff was damaged in the sum of thirty-one thousand five hundred dollars.

The answer admitted the making of a contract between plaintiff and defendant at the time and with respect to the matter stated, but put in issue some of the terms of the contract; averred that the contract was for seven million feet of lumber, and no more; averred full performance on its part of the contract as made; that a part of the tramway the plaintiff agreed to build he did not complete at all and that the other portion of it was constructed with such short and irregular curves and uneven and excessive grades, and in so unworkmanlike, insufficient and defective a manner, that it could not be successfully worked by him, and was of little value when turned over to defendant at the end of the season; and, in short, that plaintiff's failure to manufacture and deliver all the lumber he agreed to was due to his own fault and not to defendant, by which defendant was damaged in the sum of eighteen thousand dollars, for which it asked judgment by means of a cross-complaint filed in the action.

After trial there was a verdict and judgment for the plaintiff for $10,241, and costs. The appeal is by the defendant. Both sides agree that the engine furnished by the defendant would not work successfully on the tramway built by the plaintiff, but, why, was the question; defendant contending that it was because of the worthlessness of the tramway, and the plaintiff, that it was because the engine was not adapted to a tramway of that kind, and was not the kind of an engine defendant had agreed to furnish.

The court below instructed the jury:

"If the jury believe from the evidence that the engine furnished by defendant to plaintiff was not of the make and description it had contracted to furnish him, and that the plaintiff duly notified the defendant of the defects in said engine, and of its unfitness for the purposes of said contract, and afterward, without any default on his part, made every reasonable effort in good faith to accomplish the purposes of said contract, and to prevent loss or injury, but ultimately, by reason of defendant's failure to furnish an engine of the kind and make agreed to be furnished, suffered damage, and was prevented from manufacturing lumber, which he otherwise would have manufactured, then the plaintiff is entitled to recover as damages the contract price for the lumber which he was so prevented from manufacturing, less the ex-

pense he would have incurred in manufacturing said lumber, over and above the amount necessarily expended under the circumstances, in manufacturing the amount actually manufactured by him."

We are unable to comprehend the rule of damages laid down by the court, and it is quite certain the jury could not have understood it. The instruction is clear enough down to the clause "over and above the amount necessarily expended under the circumstances in manufacturing the amount actually manufactured by him"; but the insertion of this clause rendered the instruction unintelligible.

Judgment and order reversed and cause remanded for a new trial.

We concur: McKinstry, J.; McKee, J.

BECKER, Respondent, v. FERRIER, Appellant.

No. 8924; November 28, 1883.

Pleading—Demurrer Sustained—Refusal to Amend.—A dismissal of the cross-complaint rightly follows a defendant standing on his answer and declining to amend after a demurrer to the latter has been sustained.

APPEAL from Superior Court, Santa Barbara County.

B. F. Thomas for respondent; Hall & Requa for appellant.

By the COURT.—The court below rightly sustained the demurrer to the cross-complaint filed by Catherine Ferrier, and the cross-complainant having failed to amend her pleading within the time allowed by the court, but instead having in open court declared her intention to stand upon the pleading as originally filed, the court properly entered an order dismissing it: King v. Montgomery, 50 Cal. 116.

Judgment affirmed.

KEATING v. EDGAR.

December 8, 1883.

1 Pac. 155.

Appeal—Failure to File Briefs—Abandonment.—An appeal will be considered abandoned when the appellant fails to file his points prior to the day set for argument, as required by the rule, or to file a brief within the time allowed by the court.

By the COURT.—No points were filed by appellant prior to the day on which the cause was set for argument, as required by rule, nor has appellant filed a brief within the time allowed by the court. We feel justified in treating the appeal as abandoned, but have looked into the record and are not satisfied that error was committed by the court below.

Judgment and order affirmed.

PEOPLE v. LEE HUNG.

December 10, 1883.

1 Pac. 155.

Arson.—Instructions in Prosecution for arson held sufficient.

By the COURT.—The seventh and ninth instructions asked by defendant's counsel were substantially given in the charge of the court; therefore the refusal of the request was not error.

The court did not err in instructing the jury that it was not necessary to prove that the defendant occupied the building which was burned, or that he was ever at any time the tenant of M. Graff, although it was so alleged in the indictment. The allegation was wholly immaterial, and it was unnecessary to prove it. The refusal to give an instruction the exact reverse of the one given on this point was not error.

It was not error to refuse to give the following: "Arson is a crime against the security of the dwelling-house as such and

the possession, and not against the building as property." The court gave the code definition of arson. That was sufficient.

Judgment and orders appealed from affirmed.

SMITH, Respondent, v. TAYLOR, Appellant.

No. 8046; December 26, 1883.

1 Pac. 353.

Attachment—Leave of Court to Release.—No sanction by the court is needed to make a release of attached property by the attaching creditor valid.

Craig & Meredith for respondent; C. H. Parker for appellant.

SHARPSTEIN, J.—The finding that "the plaintiff did not, at any time, release or cause to be released from attachment property of the defendant Robinson," is not justified by the evidence, which shows "that real property sufficient in value of the defendant Robinson had been duly attached to satisfy any judgment which might be obtained in said action against said Robinson and Taylor"; and that the sheriff was directed by the attorneys of the plaintiff to release said property of said defendant Robinson from said attachment.

The claim of respondent's counsel that real property attached as this was can only be released by order of the court is not in our opinion tenable. The code provides for a discharge of a writ of attachment, by order of the court on motion of the defendant, on the ground that the same was improperly or irregularly issued. But there is nothing to indicate an intention to preclude an attaching creditor from voluntarily releasing property attached, or that such a release would not be valid until it received the sanction of the court. And we know of no way in which the plaintiff could have made a release more effectual than by directing the sheriff to release the property described from the attachment. The cases which hold that the sheriff could not do this with-

out the order of the court, or the consent or direction of the plaintiff, have no application to this case.

Judgment and order reversed.

We concur: McKinstry, J.; Thornton, J.; Morrison, C. J.; Myrick, J.; McKee, J.

CALIFORNIA INS. CO. v. SCHINDLER and Others.

December 27, 1883.

1 Pac. 474.

Suretyship—Liability on Second Bond.—In an Injunction Suit an undertaking was given for a temporary restraining order, valid to a certain date. On that date another undertaking was filed for a continuance of the injunction, with different sureties. Held, on a suit against the second sureties, that under the recitals the second undertaking was not given in place of the first one, and that the sureties sued were not liable for the damages caused during the time covered by the first undertaking.

Pillsbury & Titus for plaintiff; Fox & Kellogg for defendants and appellants.

McKEE, J.—The action in hand was brought against defendants, as sureties to an undertaking in the sum of two thousand five hundred dollars to recover damages which the corporation, plaintiff in the action, claims to have sustained by reason of, and during the continuance of, a restraining order, and the costs and expenses incurred in procuring its dissolution. The restraining order was made on March 15, 1879, in an action commenced on that day by George W. Carter against the said corporation to perpetually enjoin it from collecting an assessment which had been levied upon its outstanding policies of insurance. At the time of filing the complaint in the action Carter obtained an order to show cause why a temporary injunction should not be issued, and also an order ad interim restraining the corporation from doing any act or thing in the way of collecting the assessment. On obtaining this last order he gave bond, as required by the court, in the sum of one thousand dollars, conditioned accord-

ing to section 525 of the Code of Civil Procedure. That bond was filed and approved by the court on March 15, 1879.

The order to show cause came on to be heard April 11, 1879. On that day counsel for both parties argued and submitted Carter's application for a temporary injunction. The court took the application under advisement, and, at the same time, required Carter to give and file a further undertaking in the sum of two thousand five hundred dollars, with the like conditions and provisions contained in the one thousand dollar bond, "as a condition to the further continuance of the injunction." This additional bond was given, approved and filed on the day of the entry of the order which required it. Three days thereafter, namely, on April 14, 1879, the court dismissed the order to show cause, denied the application for a writ of injunction on the ground that the plaintiff in the action was not entitled to the writ, and discharged the restraining order on the ground that it had been improperly made. From that order no appeal has been taken; the order has not been in any respect modified or reversed; it stands in full force, although the injunction suit is yet pending.

At the trial of the action upon the breach of the two thousand five hundred dollar undertaking the court found as follows, namely:

"(1) That the district court ordered that the undertaking for two thousand five hundred dollars be given and filed in the place and stead of the bond already filed, to wit, the aforesaid bond of one thousand dollars; and that in pursuance of the order thus made the undertaking was given, approved and filed in the place and stead of the bond for one thousand dollars.

"(2) That, in order to procure the dissolution and discharge of the restraining order, the corporation employed and paid to counsel for professional services in that matter the sum of five hundred dollars; and that it has also sustained damages in the sum of six hundred and five dollars, in consequence of being prevented and hindered by the restraining order from carrying on business for thirty days, during which time it had to pay that sum of money for office rent, salaries of officers and employees, and office expenses and the like."

The first finding is directly opposed to the averment in the complaint upon the subject to which it relates, and to the

recitals in the undertaking upon which the action is founded. The averments of the complaint are that the court made an order that the undertaking be given "as a condition to the further continuance of the said injunction," and that "the undertaking was given under and in pursuance of said order." And the recitals in the undertaking are:

"Whereas, the above-named plaintiff has commenced an action in the district court of the twelfth judicial district of the state of California, in and for the city and county of San Francisco, against the above-mentioned defendant, and is about to apply for an injunction in said action against the said defendant, enjoining and restraining the said defendant, its officers, directors, and servants, from the commission of certain acts as in the complaint filed in said action is more particularly set forth and described:

"Now, therefore, we, the undersigned, David Schindler and N. Wyckoff, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake, in the sum of two thousand five hundred dollars, gold coin of the United States, and promise to the effect that in case said injunction shall issue the said plaintiff will pay to the said parties enjoined such damages, not exceeding the sum of two thousand five hundred dollars, gold coin of the United States, as such parties may sustain by reason of said injunction, if the said district court finally decide that the said plaintiff was not entitled thereto.

"Dated this eleventh day of April, A. D. 1879."

In the presence of the fact admitted by the complaint and recited in the undertaking (which is also made part of the complaint), that the undertaking was given as a condition to the further continuance of the injunction, there is no place for presumption or proof that it was given in the place or stead of a former undertaking in the case; and the finding, being contrary to the averments of the complaint, is outside the case made by the plaintiff, and renders the decision of the court erroneous for defective findings: Murdock v. Clark, 9 Pac. C. L. J. 207; Silvey v. Neary, 59 Cal. 97; Tracy v. Craig, 55 Cal. 91; Hill v. Den, 54 Cal. 20.

The second finding is also outside the limits of the cause of action arising out of a breach of the undertaking. It includes damages for which defendants, as sureties to the un-

dertaking, are not legally bound. For whether the undertaking was given as a condition for further continuing the restraining order, as is alleged in plaintiff's statement of its cause of action, or in the place or stead of the first bond for one thousand dollars, given when the restraining order was made, as it has been found by the court, the sureties to the undertaking bound themselves only prospectively from the day of the execution of their undertaking, and not retrospectively; they were, therefore, not liable on a breach of their undertaking for damages which the obligee may have sustained before the date of their obligation. It is too well settled to need reference to authority that the obligation of sureties arises out of the terms of their contract, and can never arise from implication or inference. To the extent, and in the manner, and under the circumstances expressed by those terms, they are bound, but no further.

Now, by the express terms of the undertaking in suit, defendants promised to pay such damages as might be sustained by reason of the injunction, if the court shall finally decide plaintiff was not finally entitled thereto. Undoubtedly the "injunction," in the minds of the contracting parties, was the ad interim order by which the corporation was enjoined from doing the acts and things complained of, until the application for a temporary injunction was heard and decided. That order was made and had been operative, upon the one thousand dollar bond, from March 15, 1879, until April 11, 1879. On that day the defendants contracted for its further continuance. Then, and not until then, the obligation arising out of their contract commenced; and it continued from that time onward until the happening of the contingency which caused a breach of the obligation, upon which they became liable for any damages which may have been sustained during the existence of their obligation, but not for damages suffered anterior to its date. For such damages a bond had been already given, upon which other persons were liable. It may be that those who were sureties to that first bond had become insolvent, or that its penalty was insufficient, and that on these grounds the court required the giving of the additional undertaking as a condition "to a further continuance of the restraining order"; but in either case the sureties to the first bond would be bound for the damages caused by

the order before the giving of the second bond; and, at all events, the sureties to the second could not be made liable therefor until the remedy on the first bond had been exhausted: Lane v. State, 24 Ind. 421; Bales v. State, 15 Ind. 322.

Whence it results that the court below erred in deciding upon the findings that the defendants were liable upon their undertaking for damages suffered by the plaintiff, by reason of the restraining order, before the date of their obligation.

Judgment reversed and cause remanded for further proceedings.

I concur in the judgment: Myrick, J.

CONCURRING OPINION.

We concur in the reversal of the judgment on the ground that the action was prematurely brought: Clark v. Clayton, 10 Pac. C. L. J. 344; Dougherty v. Dore, 11 Pac. C. L. J. 76.

Sharpstein, J.
Morrison, C. J.
Thornton, J.

GUTIERREZ v. BRINKERHOFF.

December 28, 1883.

1 Pac. 482.

Fraud.—A Deed Untainted by Fraud is not Impeachable for Fraud committed afterward in the obtaining of another deed between the same parties for different premises.

New Trial—Discretion—Change in Incumbency of Bench.—A motion for a new trial on the ground of insufficiency of evidence is addressed to the discretion of the court, and will not be reversed unless a manifest abuse of discretion is shown. The fact that there was a change in the incumbency of the bench between the trial and the determination of the motion for a new trial does not change the rule.

Irving, Benham & Packard for plaintiff and appellant; Winans & Belknap for respondent and defendant.

McKEE, J.—The case in hand arises out of an action which was brought by the plaintiff, as widow and sole devisee of Octaviano Gutierrez, deceased, to obtain a decree annulling and setting aside certain documents affecting a tract of land in Santa Barbara county, known as the rancho La Laguna, upon the grounds that the same were obtained by fraud and without consideration. Upon a trial of the issues raised by the pleadings, decision and judgment were rendered in favor of the plaintiff. Within statutory time, defendants moved for a new trial upon a statement of the case, settled and certified by the judge who heard and decided the case, but, before the motion came on to be heard, his term of office ended, and the motion was argued and submitted upon the statement to his successor in office, who ordered the judgment vacated and the case to be retried. From that order the plaintiff has appealed; and it is contended that the judge of the court below not only abused his discretion in granting a new trial, but committed error prejudicial to the rights of the plaintiff.

The statement of the case, upon which the order was made, shows that Gutierrez claimed the Laguna ranch under two inchoate grants from the Mexican government, one of which was dated March 12, 1844, and the other November 13, 1845. The first was a provisional grant "for three leagues of land of the tract called La Laguna," and the second a grant of the same character for "the land described and set forth in the map accompanying the grant." When these grants were made and delivered, Gutierrez was a married man and the husband of the present plaintiff. He and his family continued to occupy the ranch after the acquisition of California by the United States, and in 1854 he presented his grant for confirmation to the United States board of land commissioners. Confirmation of his claim to the extent of three square leagues of land was made by the board. But the case was afterward taken into the United States district court for the eighth district of California, where a decree of confirmation was obtained as follows: "To the extent of eleven square leagues within the boundaries called for in the grant, and described in the map accompanying it, provided that should there be a less quantity than eleven square leagues contained within said boundaries, then confirmation is hereby made to such less quantity." That confirmation became final, and un-

der the decree the United States surveyor general for California, in October, 1860, caused a survey of the ranch to be made, which included four leagues of land. The plot of this survey was returned and filed in the surveyor general's office at San Francisco. In December, 1860, that officer indorsed upon it his final approval, and for making the survey and the work appertaining to it he was paid by the United States government, in March, 1861. But instead of forwarding the approved plot of the survey and the documents connected with it to the commissioner of the general land office at Washington for final approval, they were permitted to remain in the office at San Francisco.

Gutierrez having been awarded four leagues of land where he applied only for three, was satisfied with the survey, and acquiesced in it for several years. But in the beginning of the year 1865 the surveys of surrounding ranches had uncovered a large area of public land, from which it became possible to obtain an extension of seven leagues in addition to the four leagues which had been already awarded to him. In January, 1865, he had given the defendants Brinkerhoff and Scollan a lease and executory contract for the exploration of the ranch for oil. While working under that contract, Brinkerhoff satisfied himself, after a careful examination of the records of Gutierrez's claim, of the feasibility of obtaining an extension of the ranch, under the decree of confirmation, and a patent for eleven leagues; and he proposed to Gutierrez that he would, in consideration of two leagues of the extension, procure, at his own cost and expense, such an extension and patent. This was in March, 1865. Gutierrez accepted the proposition, and Brinkerhoff immediately commenced proceedings in the United States surveyor general's office in San Francisco to set aside the approved survey of December, 1860, and to obtain an order for a new survey of the ranch. Pending these proceedings, Gutierrez, in performance of his agreement, on June 14, 1865, executed and delivered to Brinkerhoff and Scollan a deed, reciting a consideration of ten dollars, for two leagues of the ranch outside the four leagues; and, afterward, in December, 1865, Brinkerhoff obtained a conveyance of the remaining five leagues outside the four leagues by a deed which recited a consideration of fifteen hundred dollars. By these deeds Brinkerhoff acquired

the title to about thirty thousand acres of land for the consideration of fifteen hundred and ten dollars.

It is charged that at the times of the transactions which resulted in the transfer of the title to these seven leagues of the ranch, the owner, Gutierrez, was an unsuspicious old man, feeble in mind and body, ignorant of the English language, and unacquainted with business transactions; that Brinkerhoff was his family physician, friend, and confidential adviser, to whom had been intrusted the management and control of the proceedings relative to the ranch; that he abused this confidence by using it to cheat and defraud Gutierrez out of his title to the ranch; and that, in the execution of this design, he procured the deeds and other documents in connection with them to be executed and delivered to him by false promises, and without consideration, and by false and fraudulent representations of the nature and contents of the documents and of the uses to which Brinkerhoff intended, with the assistance of Scollan, to apply them.

Brinkerhoff was a practicing physician; and, at least, about the time of the execution and delivery of the last deed was the family physician of Gutierrez, and continued to act as such until the time of the death of Gutierrez. In November, 1863, he had succeeded in obtaining an order from the surveyor general's office for a new survey of the ranch, and, while he was engaged in that proceeding, he also acted as agent and attorney in fact for Gutierrez, under two powers of attorney, one of which was executed in October, 1865, empowering him to sell and convey the five leagues of the extension of the ranch, and the other on November 29, 1865, empowering him to sell and convey his entire interest in the ranch, including the four leagues. At the time of these transactions and of the execution of the deed of the 29th of December, 1865, Gutierrez was in "embarrassed circumstances," "harassed for money," and in debt to Brinkerhoff for borrowed money, for which the latter held his promissory notes bearing interest at one and one-half per cent per month. Under these circumstances Brinkerhoff procured the deed of December 29th.

The court found that Gutierrez was deceived by Brinkerhoff into the execution and delivery of both deeds; that Brinkerhoff induced him to execute and deliver the deed of the

14th of June by willful, false, and fraudulent representations "that his business relative to said ranch would be facilitated"; and under these representations the deed was executed and delivered without any consideration being paid, or intended to be paid; that Brinkerhoff, after obtaining the title to the two leagues, and while he was acting as the agent of Gutierrez, entered into certain secret and corrupt arrangements with some of the officers in and connected with the surveyor general's office in San Francisco for procuring the extension of the ranch and a patent for eleven leagues, to carry out which he, regardless of his duty of physician, friend, and confidential adviser, by false and fraudulent representations procured the execution and delivery of the deed of the 29th of December for a grossly inadequate consideration, which was never paid.

The finding as to the nonpayment of the consideration of the last deed is contrary to the evidence. And whatever there may be arising out of the fact of inadequacy of consideration, and out of the legal relations of principal and agent, of debtor and creditor, and of the other relations of confidence existing between the parties at the time of obtaining that deed, from which fraud in fact might be inferred, there is nothing in the statement of the case tending to show the existence of such legal relations between them at the time of the arrangement for obtaining an extension of the grant, or that the deed of June 14th, executed in consummation of that arrangement, was procured by fraud in fact.

In the absence of actual or constructive fraud the arrangement was valid and binding. Both parties deliberately entered into it; the one agreeing to pay all the expenses and furnish the skill and labor necessary to carry on the proceedings for obtaining the extension and patent, and the other to convey two leagues of the seven leagues of land which would be obtained from the government. In no respect was Gutierrez deceived in entering into the contract. He knew exactly its terms, and its scope and object; and after the proceedings had been commenced for the attainment of that object, he performed his part of the contract by the execution and delivery of the deed. There was not a single circumstance adduced by the plaintiff to show that that deed was tainted with fraud. The evidence that it was executed and delivered in

good faith, and for a valuable consideration rendered, appears to be all one way, and its validity could not be affected or changed by any subsequent conduct of Brinkerhoff in obtaining the deed of December 29th, even if the circumstances under which that deed was obtained tainted it with fraud. A deed untainted by fraud is not impeachable for fraud committed afterward in the obtainment of another deed, for different premises, by the same grantee from the same grantor.

There is no pretense that the original arrangement for the obtainment of an extension of the ranch and a patent for eleven leagues, under the decree of confirmation, was intended by the parties to it to swindle and defraud the government out of its public lands, or that the grantees, in performance of the arrangement, procured the deed for that purpose; and even if that were so, it is difficult to see how Gutierrez, as a party to it, could invoke out of such a transaction an enforceable cause of action against his alleged partners in fraud: Depuy v. Williams, 26 Cal. 309; Gregory v. Haworth, 25 Cal. 653; Davis v. Mitchell, 34 Cal. 90.

Order affirmed.

We concur: Sharpstein, J.; Myrick, J.

McKINSTRY, J., Concurring.—I concur in the judgment. The transcript shows a substantial conflict in the evidence bearing upon several of the issues and findings. It has frequently been held here that a motion for a new trial on the ground of the insufficiency of the evidence is addressed to the sound legal discretion of the court below, and that an order granting a new trial on that ground will not be reversed unless it appears there has been manifest abuse of discretion: Pierce v. Schaden, 55 Cal. 406; Bronner v. Wetzlar, 55 Cal. 419; Phelps v. Union C. M. Co., 39 Cal. 410; Hall v. Banning, 33 Cal. 522. Such manifest abuse of discretion does not appear.

The circumstance that there was a change in the incumbency of the bench, intermediate the trial and the determination of the motion for a new trial, makes no difference in the application of the rule: Altschul v. Doyle, 48 Cal. 435; Macy v. Davila, 48 Cal. 646; Blum v. Sunol, 11 Pac. C. L. J. 275.

SAN DIEGO CO. v. C. S. R. CO.

January 16, 1884.

1 Pac. 897.

Taxes—Action to Recover.—District Attorneys are not Authorized to Commence and prosecute actions for the recovery of delinquent taxes. Any county may do so in its own name, and its action is to be directed by the board of supervisors of such county. The district attorney having brought this action without their direction or ratification, no attorney's fees can be recovered of the defendant, nor costs against the plaintiff.

W. J. Hunsaker and W. M. Smith for appellant; H. E. Cooper and M. A. Luce for respondent.

SHARPSTEIN, J.—District attorneys are not expressly authorized by any law of this state to which our attention has been directed to commence and prosecute actions for the recovery of delinquent taxes. By the act of April 23, 1880 (Stats. 1880, p. 136), any county is authorized to sue in its own name for the recovery of delinquent taxes, and a form of complaint is prescribed. But no officer or board of officers is expressly authorized to commence the action, and unless the power to do so is within the general powers of some officer or board of officers, we must treat it as a casus omissus. It is clearly not within the enumerated duties of district attorneys: Pol. Code, art. 8. The powers of boards of supervisors are much broader. They have the power "to supervise the official conduct of all county officers . . . . charged with assessing, collecting," etc., "of the public revenue" (Pol. Code, 4046); "to direct and control the prosecution and defense of all suits to which the county is a party" (Pol. Code, subd. 15), and "to do and perform all other acts and things required by law not in this title (Pol. Code, pt. 4) enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government": Pol. Code, subd. 26. This, in our opinion, confers power upon boards of supervisors to direct the commencement and prosecution of actions for the recovery of delinquent taxes, and we think no one is authorized to commence such an action

until directed to do so by the board of supervisors of the proper county. And as the court found that the board of supervisors never directed or authorized the institution or prosecution of this suit, or ratified the action of the district attorney in bringing the same, it necessarily results that no attorneys' fees can be recovered of the defendant nor costs against the plaintiff.

The judgment, therefore, must be reversed, and the court below is directed to dismiss the action.

We concur: Myrick, J.; Thornton, J.

JONES and Others v. MEYER.

January 17, 1884.

1 Pac. 892.

Finding.—The Evidence Herein Sustains the Finding objected to, and substantially responds to the issue.

Becknell & White for respondent; Smith, Brown & Hutton for appellants.

McKINSTRY, J.—Appellant contends that finding 1, that defendant "refused to allow plaintiffs to reject one hundred sheep from the band of sheep numbering about two thousand that he offered to deliver to plaintiffs," does not respond to the issue, which was: Did defendant offer to deliver two thousand sheep, permitting plaintiffs to reject one hundred of them? But the court found that he offered to deliver a band of sheep, and he refused to allow plaintiffs to reject one hundred of these so offered. And there was evidence to sustain the finding. The witness Collom testified: "The defendant had a band of sheep there that he alleged to be two thousand in number, which he offered to deliver to us, but refused to allow us to reject one hundred of the number," etc.

We concur: McKee, J.; Ross, J.

BURTON v. NICHOLS.

January 17, 1884.

1 Pac. 896.

Appeal.—Where the Evidence is Conflicting, the Finding of the trial court thereon will not be disturbed.

Charles Fernald for respondent; C. A. Thompson and W. C. Stratton for appellants.

By the COURT.—The only point made by appellant is that the evidence does not justify the finding that the lands described in the complaint are not situated within the boundaries of the rancho Jesus Maria as patented by the United States. The testimony of the witnesses called by the defendant at least created a substantial conflict with reference to the location of the demanded premises, and we cannot say that the evidence did not sustain the finding of the court.

Judgment affirmed.

In re Estate of CURTIS.

January 19, 1884.

2 Pac. 46.

Appeal—Failure to File Transcript.—Appeal Dismissed for want of transcript being filed.

Charles F. Hanlon for respondents; Freeman & Bates for appellant.

By the COURT.—No transcript on appeal having been filed in this cause, according to the rules and practice of the court, the motion made by respondents G. L. Curtis and W. C. Curtis, to dismiss the appeal from the judgment, is sustained; and as to them the appeal from the judgment is dismissed.

PHILLIPS v. SUTHERLAND.

January 19, 1884.

2 Pac. 32.

Replevin—Judgment.—Where, in an Action for the Recovery of Personal Property, the property is not delivered to the plaintiff, he is entitled, if he recover, to a judgment for the property or its value, the value being the value as of the day of trial.

J. J. Jacobs for respondent; Atwell & Bradley and P. D. Wigginton for appellant.

McKINSTRY, J.—The action is to recover the possession of specific personal property. The property not having been delivered to plaintiff, the court properly found its value, and the judgment was in the alternative, for the property, or its value if the property could not be delivered: Code Civ. Proc., 667. If plaintiff recover in such an action, he is entitled primarily to the very property, and the value which he is to receive, instead of the property, is the value as of the day of trial. The money value is a substitute for the property, and the amount can be approximately fixed by ascertaining it as of the date (when the value can be judicially determined) nearest to the time when the property would be delivered. It follows that the error of the court in allowing an unverified amendment to a verified complaint, and in allowing the amendment to be made by defacing the record—erasing words from and interlining others in the original complaint—did not injure defendant.

Judgment and order affirmed.

We concur: McKee, J.; Ross, J.

HARRIS v. CAREAGA.

January 19, 1884.

2 Pac. 41.

New Trial.—Where a Cause has Been Referred to a Referee, Who Returns His Decision and judgment to the court, the date of their filing is to legal intent the date of their rendering, and they have not until then a legal existence upon which a motion for a new trial might be based. Stipulated statements, notices, or other proceedings, had before the date of such filing, are wholly insufficient as a basis of a motion for a new trial.[1]

Metcalf & Metcalf for plaintiff and appellant; R. B. Canfield for defendant and respondent.

McKEE, J.—The appeal in this case is from an order granting a new trial. The motion for a new trial was heard and determined upon an authenticated statement of the case. At the hearing appellant's attorney objected to the motion, and moved to dismiss it, upon the ground that no notice of it has been given according to law. The objection was overruled. It appears that the case arose out of an action for the dissolution of a partnership and a settlement of the partnership affairs. By an order of the court the case was sent to a referee to take the testimony and an account, and report the same, with his decision and judgment, to the court. On January 9, 1882, the referee, after having taken the testimony and stated an account, which showed a balance due to the plaintiff, prepared his finding of facts and conclusions of law, and a judgment thereon, which he presented with his report to the clerk of the court, to be filed, under the provisions of section 644, Code of Civil Procedure. But the attorney for the defendant appeared and objected to the filing of the same, and, at the same time, applied to the court for time to prepare and serve objections to the decision and judgment. The court granted him until January 23, 1882, to prepare and file such

[1] Cited and followed in Careaga v. Fernald, 66 Cal. 352, 5 Pac. 616, holding proceedings to obtain a new trial ineffectual if taken before filing of findings.

objections, and ordered the clerk to retain the custody of the report, decision and judgment, and not to file the same until the further order of the court. Eight months thereafter, namely, on September 8, 1882, the court ordered that the report, decision and judgment of the referee be filed, and the same were indorsed by the clerk filed on that day. After filing, no notice of intention to move for a new trial was served or filed; but nearly seven months before the filing, namely, on February 13, 1882, the defendant served and filed such a notice, and preceded it by service of a document styled, "Statement of evidence introduced and proceedings had before the referee herein, with exceptions taken on the trial before him, proposed by defendant to be made part of the report of the referee hereinafter to be filed." And on the twenty-third day of February, 1882, the attorneys of the parties stipulated in writing to the effect that the statement, with exceptions taken on the trial before the referee, and served February 3, 1882, stand also as a proposed statement on motion for a new trial, and that the motion shall be heard April 25th, unless defendant's attorney shall be absent on that day from the county of Santa Barbara; the plaintiff's attorney "reserving the right to make any legal objection and exception to the proposed statement." On March 13th an extension of time for thirty days from that date was obtained for presentation of the statement for settlement. In fact, however, the statement was not presented until May 1, 1882, and on that day the attorney for the plaintiff objected to the settlement on the ground that the statement had not been presented in time. It was settled, however, over his objections, and, as settled and engrossed, it was ordered to be filed, and was filed on September 8, 1882, with the decision and judgment reported by the referee. On that day the case was considered as tried to a legal intent: Hastings v. Hastings, 31 Cal. 95. The decision and judgment were then rendered, and, for the first time, had a legal existence upon which the right to move for a new trial could be put in motion. But the attempt to exercise the right before the decision was ineffectual for any purpose, and the proceedings under it were wholly insufficient as a basis for the motion. In Mahoney v. Caperton, 15 Cal. 314, it was so held of a notice of intention given one day before the rendition of the judgment. And in Flateau v.

Lubeck, 24 Cal. 364, it was held that a stipulated statement could not be made the foundation of a motion for new trial where no notice of intention to move had been served and filed. So, in Bear River & A. W. & M. Co. v. Boles, Id. 354, it is said: "Where no notice of intention to move for a new trial is given or waived, the making and filing of a statement does not give the court jurisdiction over the subject matter of a new trial, and an order granting a new trial will be reversed." To the same effect will be found Ellsassar v. Hunter, 26 Cal. 279, and Calderwood v. Brooks, 28 Cal. 152.

Order reversed.

We concur in the judgment: McKinstry, J.; Ross, J.

CALIFORNIA SOUTHERN R. CO. v. COLTON LAND & WATER CO.

January 19, 1884.

2 Pac. 38.

Eminent Domain.—The Averments Herein Show Sufficiently That the Defendant was properly named, and was not the known owner and claimant of the land sought to be condemned. A demurrer, therefore, on the ground that these facts did not appear, as required, was properly overruled.[1]

Eminent Domain.—The Compensation for Land Taken Under Condemnation proceedings is the value of it at the time of trial, and not at the date of the summons, as prescribed in section 1249, Code of Civil Procedure.

Byron Waters and H. E. Cooper for plaintiff and respondent; J. A. Gibson and J. O. Bethune for defendant and appellant.

McKEE, J.—It is contended that the court below erred (1) in overruling the demurrer to the complaint in the proceeding; and (2) in excluding evidence, offered by the defendant, to

[1] Cited and explained in Tehama Co. v. Bryan, 68 Cal. 65, 8 Pac. 673, holding section 1249, California Code of Civil Procedure, fixing the measure of damages as of date of summons constitutional.

prove the value of the land in controversy at the time of the trial. The object of the proceeding was condemnation of a strip of land for the right of way for a railroad. By a general demurrer the defendant objected that the complaint did not contain facts sufficient to entitle the plaintiff to exercise the right of eminent domain, because, as was urged on the argument, it did not contain "the names of all owners and claimants of the property, if known, or a statement that they were unknown," as required by subdivision 2, section 1244, Code of Civil Procedure. But the complaint contains the name of the defendant as a corporation duly organized and acting under the laws of the state of California, and the following allegations: "That plaintiff is constructing a railroad from the said National City northward to a connection with the railroad of the Atlantic and Pacific Railroad Company at or near the thirty-fifth parallel of north latitude, in the state of California; that in the construction, maintenance and operation of its railroad the plaintiff needs, and by this action seeks to acquire, a right of way one hundred feet in width, through the lands of the defendant; said right of way being more particularly described as follows: Being a strip of land one hundred feet in width, located and included between lines on each side of, parallel to, and fifty feet distant from the center line of location of plaintiff's railroad, as the same is located through the lands of the defendant; said center line being located as follows," etc. These averments sufficiently show that the defendant was properly named, and that it was the known owner and claimant of the land which plaintiff sought to condemn for the right of way in the construction of its road. There was, therefore, no error in overruling the demurrer.

Under section 1248, Code of Civil Procedure, testimony was taken in the proceeding on June 23, 1883, more than five months after the date of the summons issued in the proceeding. At the taking of testimony the defendant offered to prove, by witnesses then present, the value of the land proposed to be condemned at that time. To this offer plaintiff's counsel objected, on the ground that the date of the summons was the date at which the value must be estimated. The court sustained the objection, and, on submitting the case to the jury, at plaintiff's request instructed the jury as follows:

"The jury are instructed that the actual market value of the property sought to be condemned on the day of issuing the summons (which in this case was the fourth day of January, 1883) is the amount of compensation to be assessed for the property to be taken, irrespective of prospective or speculative value." The rulings of the court were doubtless based upon section 1249, Code of Civil Procedure. That section declares that, "for the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected," etc. But by the constitution of 1879 it is provided that "private property shall not be taken . . . . for public use without just compensation having been first made to, or paid into court for, the owner; and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation be first made in money, or ascertained and paid into court for the owner": Const., sec. 14, art. 1.

Ascertainment of compensation for land proposed to be taken for public use, or "appropriated for a right of way," is therefore the constitutional rule. The assessment of such compensation is concomitant with the right to take, and payment of the sum assessed, with the actual taking or appropriation. Upon assessment being made according to law, the right to take may be exercised. Then the obligation to pay arises, and must be performed within thirty days after the date of the assessment, else the proceeding is annullable (Code Civ. Proc., sec. 1252), and upon payment the property of the owner passes to the public use. One of the principal objects of condemnatory proceedings is the ascertainment and assessment of such compensation; and the chief element in the compensation is the value of the land required by the public necessity. Upon proof of that necessity, the value, according to the constitutional requirement, must be ascertained at the time of making the assessment, for up to the moment of making the assessment the land, or its equivalent value, belongs to the owner; and it is not subject to be taken for public use until the compensation has been first made; the owner is therefore entitled to receive its market value at

that time. "The fact to be ascertained," said the late supreme court, in S. & C. R. Co. v. Galgiani, 49 Cal. 139, "is the value of the land at the time of the taking." And Mr. Justice Sanderson says, in Fox v. W. P. R. Co., 31 Cal. 556: "It cannot be said in any legal sense that the land has been taken until the act has transpired which devests the title or subjects the land to the servitude. So long as the title remains in the individual or the land remains unchanged by the servitude there can have been no taking." "It is a mistake to suppose," says Mr. Justice Baldwin, in Bensley v. Mountain Lake Water Co., 13 Cal. 317, "that any title comes from mere appropriation of another's property or from the taking of the legal proceeding to condemn it. The constitution is express. Private property shall not be taken for public use without compensation. The compensation precedes the title. The compensation must be adequate. But adequate, when? Of course, when the property is so taken": See, also, S. F. & S. J. R. Co. v. Mahoney, 29 Cal. 112, and C. P. R. Co. v. Pearson, No. 2654, not reported. The court below erred in excluding the evidence as to the value of the land at the time of the trial.

Judgment and order reversed and cause remanded for further proceedings.

We concur: McKinstry, J.; Ross, J.

CALIFORNIA SOUTHERN R. CO. v. COLTON L. & W. CO.

No. 9191; July 25, 1884.

APPEAL from the Superior Court of San Bernardino County.

MYRICK, J.—Upon the authority of California Southern R. R. Co. v. Kimball, 61 Cal. 90, the judgment and order are affirmed.

We concur: Sharpstein, J.; Thornton, J.; Ross, J.

PEOPLE v. LEE HUNG.

January 23, 1884.

3 Pac. 109.

Appeal.—Where No Points and Authorities are Filed within the time allowed, judgment will be affirmed.

APPEAL from the Superior Court of Sacramento County.

An appeal was taken from an order sustaining a demurrer to an indictment for arson. No points and authorities were filed in the case.

C. T. Jones and J. W. Carter for appellant; Attorney General Marshall for respondent.

By the COURT.—No points and authorities have been filed in this case, although the time extended for that purpose has long since elapsed. It is therefore ordered that the judgment be affirmed.

Ex Parte BAILEY.

January 24, 1884.

3 Pac. 107.

Extradition.—Where, from the Return to a Writ of Habeas Corpus on behalf of a prisoner held under requisition proceedings, it appears that the proceedings are regular, and that the act of Congress concerning fugitives from justice has been substantially complied with, the prisoner will be remanded.

Application for a writ of habeas corpus.

The petitioner, Charles H. Bailey, was arrested, as a fugitive from justice, on a warrant issued by the governor of California upon demand of the governor of Oregon. Application was made for a writ of habeas corpus, petitioner

claiming to be unlawfully restrained of his liberty, in that the warrant under which he was arrested was issued without authority of law as no copy of an indictment found, or affidavit charging said petitioner with any crime, had been produced to the governor of California. The return showed the warrant issued as above, as authority for the arrest and as evidence of its regularity.

Frank O'Connor for petitioner; Alfred Clarke for respondent.

By the COURT.—Without passing on the question whether this court has the power to go behind the return herein, we say that it clearly appears to us, from the papers produced, on which the governor of this state acted, that his action was regular, and that it substantially complied with the act of Congress concerning fugitives from justice. The petitioner is therefore remanded.

FOWLER v. HEINRATH.

January 25, 1884.

2 Pac. 248.

Injunction—Dissolution—Review on Appeal.—Where there is nothing in the record to show upon what the court acted in dissolving an injunction, the presumption is that it was dissolved upon good cause shown. Moreover, the retention or dissolution of an injunction is within the sound discretion of the court, with which this court will not interfere unless the record shows abuse of discretion.

S. W. Geis for respondent; Frank H. Farrar for appellant.

McKEE, J.—The appellant (plaintiff in the court below) commenced an action of ejectment for recovery of possession of a tract of land. In addition to the statement of a cause of action in ejectment, the complaint contained averments to the effect that, at the time of the alleged entry and ouster by the defendants, there was upon the land a crop of grain which had been planted by the plaintiff, a portion of which

the defendants, since their entry, had cut and stacked upon the land; that they threatened to cut the remainder, and to remove the entire crop from the premises and convert it to their own use; and that they were insolvent, and a judgment against them for the value of the grain would be unavailing. The complaint was verified, and upon filing it, together with an injunction bond, conditioned according to law, a temporary injunction was issued restraining the defendants from disposing of, removing or injuring any of the grain, whether uncut or cut, and stacked upon said premises. But the court afterward, on motion of the defendants' counsel, and after argument of counsel of the respective parties, dissolved the injunction.

In the record which the plaintiff brings before us, on his appeal from the order, there is no bill of exceptions, no statement on appeal, no papers properly certified or identifiable as the papers used on the hearing of the motion; nothing, indeed, to show upon what the court below acted in the hearing and determination of the motion to dissolve. Assuming that the verified complaint was a sufficient basis upon which to issue the injunction, and that it was properly issued thereon (Natoma Water Co. v. Clarkin, 14 Cal. 544), yet the court may have had good cause to dissolve it. The court may have been satisfied that the defendants were entirely solvent and able to respond in damages, and that the plaintiff had an adequate remedy at law against them for the recovery of the grain, or for damages for its taking or detention. Upon such a showing the injunction would have been properly dissolved, and the presumption is that the court did dissolve it upon good cause shown. Every intendment is in favor of the validity of the order. Besides, the order was made upon notice given to dissolve an injunction issued ex parte, the retention or dissolution of which is a matter within the sound discretion of the court, and this court cannot interfere with that discretion upon a record which discloses no abuse of discretion.

Order affirmed.

We concur: Ross, J.; McKinstry, J.

WILSON v. BAKER and Others.

January 26, 1884.

3 Pac. 109.

Appeal.—Where the Evidence is Insufficient to Support the Findings the judgment will be reversed.

APPEAL from the Superior Court of Stanislaus County.

This was an action brought by plaintiff, a creditor of one Love, to compel defendants, also creditors of said Love, to sign a memorandum of an agreement entered into between said Love and all his creditors, whereby he was to make an assignment for their benefit; and also to restrain defendants from further pursuing proceedings for the recovery of their indebtedness by attachment against said debtor's property. The court found that the defendants, through an authorized agent, had entered into such agreement, and had consented to dismiss their attachment and suit on condition that plaintiff also dismiss his suit against said debtor; that plaintiff performed the conditions on his part, but that defendants fraudulently refused to dismiss their attachment or join in an assignment until their claim had become a lien preferred under the statute. Defendants appealed from an order refusing to grant a new trial.

Roche & Desbeck for appellants; W. E. Turner and Schell & Treat for respondent.

MYRICK, J.—The evidence is insufficient to support the findings of the court below in the following particulars: In finding 8, that Caldwell was authorized to act for and on behalf of the defendants at the meeting of creditors, and by his acts to bind the defendants, and to enter into any agreement or contract with Love or his creditors; finding 10, so far as it is found that the defendants, or any person thereto authorized by them, made or joined in or ratified the agreement set forth in said finding 10; the whole of finding 13; finding 14, so far as it states or infers that the defendants entered into any agreement; finding 17, so far as it is found

that the defendants, at the said meeting of creditors, agreed to sign any agreement; finding 20, as to any fraud on the part of defendants.

The judgment and order are therefore reversed and the cause is remanded for a new trial.

We concur: Thornton, J.; Sharpstein, J.

OHLEYER v. BUNCE.*

January 28, 1884.

3 Pac. 105.

Insolvency—Notice—Appointment of Assignee.—In a case of involuntary insolvency there is no provision for serving any notice on the creditors who are the moving parties in the proceeding, and jurisdiction to appoint the assignee is acquired by the service upon the debtor of the creditors' petition and order of the court.

J. H. Craddock and J. S. Belcher for appellant; Stabler & Bayne for respondents.

SHARPSTEIN, J.—The court found, among other things, that at the date of said transfer said Marcuse was insolvent, and in contemplation of insolvency, and to prevent his property from being distributed ratably among his creditors he made said sale and transfer of said goods, wares, and merchandise; that said sale and transfer were not made in the usual and ordinary course of business of said Marcuse, and for that reason—there being no evidence sufficient to overcome the legal presumption raised by the fact—the defendant had reasonable cause to believe that said Marcuse was insolvent; and that said sale and transfer were made with a view to prevent the said property from being ratably distributed among the creditors of said Marcuse. The court did not find everything alleged in regard to said transfer, but it found enough to avoid the sale, and it was unnecessary to find more.

*For subsequent opinion in bank, see Ohleyer v. Bunce, 65 Cal. 544, 4 Pac. 549.

The finding that the court in which the insolvency proceeding was pending, "by an order duly made and given," appointed the plaintiff herein assignee of the estate of said insolvent, is attacked on the ground that there was not such proof as the law requires of the publication of the order appointing a meeting of creditors. In cases of voluntary insolvency it is provided that on receiving and filing the petition, schedule and inventory the court shall make an order declaring the petitioner insolvent, and appoint a time and place for a meeting of the creditors to prove their debts, and choose one or more assignees, and shall designate a newspaper or newspapers in which publication of said order shall be made, and that a copy of said order shall immediately be published by the clerk in the newspaper or newspapers designated as often as the newspaper is printed before the meeting of creditors. But in cases of involuntary insolvency, the court, on the filing of the creditors' petition, is required to issue an order requiring the debtor to show cause, at a time and place to be fixed by the court, why he should not be adjudged an insolvent debtor; and a copy of the petition and order to show cause must be served on the debtor. No provision is made for the service of any notice on the creditors, who are the plaintiffs in such cases. But the court is required to appoint a day for their meeting to elect an assignee. In a case of voluntary insolvency, the proceeding as to creditors is one in invitum; but in case of involuntary insolvency, the reverse is true. The proceeding is, then, one in invitum as to the debtor, and the code provides how and in what manner he shall be served with notice, but makes no provision for the service of any notice on the creditors who are the moving parties, or the plaintiffs, in the proceeding. In a case of voluntary insolvency the court does not acquire jurisdiction to appoint an assignee until after the order mentioned in section 6 has been made, and a copy of it published, as provided in section 7. In a case of involuntary insolvency jurisdiction is acquired by receiving the petition mentioned in section 8, making the order specified in section 9, and serving both the petition and order in the manner provided in section 10.

In this case the defendant objects that the creditors were not duly notified of a proceeding instituted by themselves, and therefore that the court did not acquire jurisdiction to

appoint an assignee of his estate. We think jurisdiction was acquired in this case by the serving of a copy of the petition of the creditors and order of the court on the debtor, and that the law did not require the publication of notice to creditors as appellant contends. It does not appear that the debts of the petitioning creditors were created after the act of 1880 took effect, nor does it appear that they were not. We are informed by the transcript that "the creditors' petition in involuntary insolvency" was introduced in evidence by the plaintiff; contents not stated. It may have shown that the debts were created after the act of 1880 went into effect. If it did not, the appellant should have incorporated it in the record, in order to overcome the finding that the order appointing plaintiff assignee was duly made and given.

Judgment and order affirmed.

We concur: Thornton, J.; Myrick, J.

HOWARD v. STRATTON.

January 29, 1884.

2 Pac. 263.

Promissory Note—Discharge—Parol to Show.—Where a promissory note is given to secure a promise by the maker that he will support the payee and care for him, and such promise is fulfilled, the note is discharged, and parol evidence is admissible to prove that a written agreement is totally discharged.

Arnold & Jones for plaintiff and respondent; Leach & Parker for defendant and appellant.

By the COURT.—The court erred in excluding evidence tending to prove that there was an agreement between Tyson and Stratton by which the former agreed to let the latter have the rancho on which he lived in consideration of his giving Tyson a home and support during the residue of his life, and that the notes sued on in this action were given by Stratton to Tyson to secure the performance by Stratton

of said agreement on his part, and that he had performed the same. The admission of such evidence would not violate the rule which forbids the introduction of parol evidence to contradict or vary a written contract. If the notes were given to secure the execution by Stratton of a promise to support and take care of Tyson, and that promise was fulfilled, the notes were discharged, and parol evidence is admissible to prove that a written agreement has been totally discharged. There is nothing in this which tends to contradict or vary a written contract.

It does not appear that an exception was taken to the ruling of the court on the defendant's motion to strike out the testimony of John Treat, and we cannot, in the absence of an exception, review said ruling.

Judgment and order reversed.

DUANE v. NEUMANN.

January 29, 1884.

2 Pac. 274, 410.

Findings.—The Trial Court must Find upon All the Material Issues raised by the pleadings, and when this rule is not observed the judgment will be reversed.

G. W. Tyler for appellant; H. Eickhoff for respondent.

By the COURT.—It has been repeatedly ruled here that the trial court must find upon all of the material issues raised by the pleadings. That rule was not observed in the present case, for which reason the judgment and order are reversed, and the cause remanded for a new trial.

We dissent: Thornton, J.; Sharpstein, J.

THORNTON, J., Dissenting.—I dissent. In my judgment, all the issues raised by the pleadings were found upon by the court below. The plaintiff in his complaint set up a contract with certain terms, and Neumann denied the allega-

tions in regard to it, and set up one with different terms as the only contract entered into by himself and plaintiff. Thus was issue joined. There was only one contract involved in the case, and the court below in its findings affirmed what the contract was; in other words, found it with all its terms. Moreover, the contract was entered into on an assignment made by plaintiff to defendant, Neumann, and the court in its findings particularly specifies the contract affirmed by it as the one made in consideration of such assignment. Now, was it necessary for the court to go further and find that the contract affirmed by it was the only contract entered into by the parties, and that there was no other? I think not. By finding the contract specifically as above stated, it in effect found that there was no other: Coveny v. Hale, 49 Cal. 556.

I think the judgment and order should be affirmed.

BURT and Others v. COLLINS and Others.

January 29, 1884.

3 Pac. 128.

Partnership.—A Partnership is not Liable for Goods Sold and Delivered to One Partner in his individual capacity, though the items be charged in the partnership account.

APPEAL from the Supreme Court of San Bernardino County.

This action was brought to recover of defendants, doing business of sheep-raising, as partners, under the name of G. A. Collins & Co., a balance on an account of goods sold and delivered. There was evidence that a portion of the goods had been purchased by Collins in his individual capacity and charged to the firm account. The court found the fact of the partnership and of the sale of the goods to the firm, and thereon rendered judgment against defendants. Defendants appealed from this judgment.

Brunson & Wells for appellants; Bicknell & White for respondents.

MYRICK, J.—Finding 3 is not sustained by the evidence. The evidence of B. F. Burt, one of the plaintiffs, found on page 44 of the transcript, shows that when the account was opened with Collins the object of using the firm name of G. A. Collins & Co. was for the personal convenience of Collins in his subsequent settlement with the herders and Mrs. Bouton, and not with the expectation that the account was the account of the firm. Besides, many of the articles sold (and charged in the account of the firm) were for the use of Collins and his family, and bore no relation to the business of the firm; and the plaintiffs did not, on the trial, segregate these items from the general account, nor show which items of the general account were for the benefit of, or went to the use of, the firm.

Judgment and order reversed and cause remanded for a new trial.

We concur: Morrison, C. J.; Ross, J.; McKinstry, J.

HEINLEN v. ERLANGER and Others.

January 29, 1884.

3 Pac. 129.

Default Against One—Service of Amended Complaint.—Where a default has been entered against one of two defendants, for failure to answer the original complaint, the failure to serve amended complaints on such defendant will not be ground for reversal of the judgment, where the record does not show that such amended complaints were not served.

APPEAL from the Superior Court of Tulare County.

E. J. Edwards for appellants; Jacobs & Merriam for respondents.

By the COURT.—In an action to foreclose a mechanic's lien, Erlanger and Jacob were made parties defendant—Erlanger as the contractor for whom the work was done and to whom the materials were furnished, and Jacob as the person claiming the property sought to be charged with the lien. To the original complaint Jacob demurred, but Erlanger made no appearance and his default was duly entered. Subsequently, the complaint was amended five times. To the fifth amended complaint Jacob answered, and upon these pleadings a trial was had. In the brief of appellants it is said that none of the amended complaints were served on Erlanger, for which reason it is contended the judgment against him must be vacated; and, further, that without a personal judgment against Erlanger, there can be none foreclosing Jacob's interest. The reply, which is a good one, is that it does not appear from the record that there was a failure to serve the amended complaint on both defendants.

Judgment and order affirmed.

CRITES v. WILKINSON.

January 29, 1884.

3 Pac. 130.

Appeal.—Where There is No Evidence to Support the Findings of the court below, the judgment will be reversed.

APPEAL from the Superior Court of Kern County.

This was an action for damages and for an injunction to restrain defendant from diverting the flow of water in a creek from ditches running over plaintiff's land—plaintiff alleging to be owner of such water right by prescription. Defendant denied plaintiff's title to such water right. The court found plaintiff to be the owner of such water right, and entitled to the injunction prayed for. Defendant appealed.

Z. G. Peck and J. W. Freeman for appellant; R. E. Arick for respondent.

By the COURT.—We have read the record attentively, and find no evidence to support the finding of the court below, to the effect that the plaintiff acquired the right to divert from the stream mentioned in the record one hundred inches of its water, measured under a four-inch pressure. The judgment securing him that right, as well as the order refusing the defendant a new trial, must therefore be reversed.

Judgment and order reversed and cause remanded for a new trial.

McNAMARA v. HAMMERSLAG.

January 29, 1884.

2 Pac. 391.

Attachment—Variance.—In a Suit on an Undertaking Given to Prevent a levy, where the complaint states that it was given to release a levy, the variation is not material.

McKee, J., dissents.

W. J. & Wm. Groves for appellant; M. C. Hasset for respondent.

MYRICK, J.—Suit on an undertaking given under section 540, Code of Civil Procedure. The complaint avers the issuance of the attachment, and that under it the sheriff attached "certain property" (not stating what kind or of what value), and that the defendants, being desirous of having the property attached released therefrom, executed the undertaking. A copy of the undertaking is attached to the complaint. The undertaking, after reciting the issuance of the writ and the command thereof, states, "now, therefore, we," etc., "in consideration of the premises, and to prevent the levy of said attachment, do hereby," etc.

The point presented by the appellants is that, as the undertaking recites that it was given to prevent a levy, the allegation of the complaint being that it was given to release a levy, the judgment cannot be sustained. The question here involved was substantially considered in the first paragraph of

the first opinion in Preston v. Hood, 64 Cal. 405, 1 Pac. 487, though in that case there was an allegation in the complaint that the undertaking was given to prevent the levy, and that upon the delivery of the undertaking the property was released. We think the point is not well taken.

Judgment affirmed.

We concur: Sharpstein, J.; Morrison, C. J.

We concur in the judgment: Thornton, J.; McKinstry, J.

McKEE, J., Dissenting.—I dissent. The allegations of the complaint are that, in an action, a writ of attachment was issued, which was levied on certain property belonging to the defendant in the action; that for the purpose of having the property attached released from the attachment, "the defendants herein executed and delivered to the plaintiff a written undertaking, a copy of which is hereto attached, marked exhibit 'A,' and made a part of this complaint"; and that upon the execution and delivery of the bond, the attachment was discharged and the property was released, yet the defendants have refused, on demand, to pay the amount of the judgment rendered in the attachment suit against their principal in the bond, and hence the suit upon the bond. Reference in a pleading to an exhibit as part of a pleading is not pleading; it is merely evidential: Mayor and Common Council of Los Angeles, etc., v. Signoret, 50 Cal. 298. The cause of action as stated in the complaint is therefore upon a bond given for the release of property which had been attached.

The answer specifically denies the allegations of the complaint. There was no finding of facts, but judgment was given for the plaintiff. Impliedly, the court found all the facts as alleged in the complaint. But the bond referred to in the complaint was not a bond for the release of property which had been taken in attachment. Its recitals are substantially: Whereas, an attachment has been issued and placed in the hands of the sheriff for execution, whereby he is commanded to attach and safely keep all the property of the defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the demand of the plaintiff in the action, as stated in his complaint, unless a bond be given in amount sufficient to satisfy the demand, and

the defendant is desirous of giving such an undertaking: "Now, therefore, we, the undersigned, ... in consideration of the premises, and to prevent the levy of said attachment, do hereby jointly and severally undertake in the sum of thirteen hundred dollars, in gold coin, and promise to the effect that if the plaintiff shall recover judgment in said action, we will pay to the plaintiff upon demand the amount of said judgment, together with the costs, not exceeding in all the said sum of thirteen hundred dollars in gold coin of the United States." The bond was therefore "to prevent the levy of an attachment." A bond given to prevent the levy of an attachment does not prove a cause of action upon a bond given for the release of property already attached. Between such bonds there is no identity; the promises to pay may be the same, but they depend upon different considerations. One could not be used to prove a cause of action upon the other. Between such a cause of action and the proof, there would be such a variance as would prevent the rendition of judgment in favor of the plaintiff. The allegations, proofs and judgment in an action must correspond to sustain the judgment.

In Percival v. McCoy, 13 Fed. 379, 4 McCrary, 418, the complaint alleged that a bond was executed and delivered by the sureties to the plaintiff as sole obligee; but the bond referred to in the complaint recited that it was given to five persons as obligees, one of whom was the plaintiff. "It seems clear," says the court in the case, "that if this bond were offered in evidence under such an allegation there would be a fatal variance between the instrument as set out and the proof. Granting that the plaintiff might sue alone, ... without joining the other obligees, he must, nevertheless, set out and state the bond correctly, with proper allegations, showing that he alone has received injury by the breach, and therefore that he brings the suit without joining the other obligees as plaintiffs. But he cannot set out a bond as running to or made to himself alone, and give in evidence an instrument to himself jointly with other obligees."

I think the judgment should be reversed: Laveaga v. Wise, 13 Nev. 296; Coburn v. Pearson, 57 Cal. 306.

LYTLE CREEK WATER CO. v. PERDEW and Others.*

February, 1884.

2 Pac. 732.

Waters.—Any Rights Which a Riparian Proprietor Would Have to the Water of the creek which touched his land, if his settlement was after the act of 1866 took effect, would be subject to the previously confirmed appropriation of the water.

Waters.—In the Absence of Any Findings as to the Order in Which the Persons interested in the appropriations of the water should use it, no decree can be entered in favor of the plaintiff which would not prejudice the other owners. The cause must be remanded, with directions that all claimants of the water rights be made parties.

Byron Waters for appellant; Satterwhite & Curtiss for respondent.

McKINSTRY, J.—The complaint alleges that plaintiff is the owner of "all the flow" of Lytle creek. The court below found that before the end of 1856 all the waters of Lytle creek had been appropriated by several persons, each acting separately, and claiming to appropriate a portion of the waters, and the waters thus appropriated by the various persons who appropriated the same, and those claiming to be their successors, were used "by turns separately and consecutively, each upon his separate land for a certain length of time, measured by hours and minutes, under the regulations of the board of water commissioners of this (San Bernardino) county, prescribing how often and the length of time each should be entitled to use the same, varying in time according to the extent of interest each held in the water so appropriated," etc. "Such separate interests in the water were held by the individuals separately, and sold, transferred, or abandoned by them respectively at their will." That plaintiff was the owner, through mesne conveyances and transfers of interests, of a portion of the waters of Lytle creek, appropriated as aforesaid, "equal in amount to the use of all the waters of said creek one hundred and thirty-two hours and

*For subsequent opinion in bank, see Lytle Creek Water Co. v. Perdew, 65 Cal. 447, 4 Pac. 426.

nineteen minutes out of each and every three hundred and seventy-two hours." That defendant A. G. Perdew, in 1867, "settled upon a tract of government land near said Lytle creek, and within the flow of the same," and "diverted and appropriated from said Lytle creek," etc. No question as to the use of the waters of a stream by riparian proprietors is presented by this record. There is nothing in the pleadings or findings to indicate that when all the waters of Lytle creek were appropriated, any of the lands by or through which the creek flows had passed into private ownership. It must be presumed, therefore, that such lands were public lands of the United States, and the rights to the waters of Lytle creek acquired by prior appropriation were confirmed by the act of Congress of 1866: 14 U. S. Stats. 218. The court found that the settlement on government land by defendant (conceding that this tract touched the creek) was made after the act of 1866 took effect. Any rights which he might acquire, therefore, from the government would be subject to the previously confirmed appropriations of the water.

The plaintiff and the other persons claiming rights in the waters of the creek derived from the original proprietors were not tenants in common. The convention inter sese of the owners of the use of all the waters appropriated, by or under which the water was used for recurring periods of time by each, did not make them tenants in common. Plaintiff had a separate title to the use of all the water one hundred and thirty-two hours and nineteen minutes of every three hundred and seventy-two hours. It is manifest that, in the absence of finding or evidence as to the order in which the persons interested in the appropriations of water used it, or as to the times when the periods during which the plaintiff would be entitled to the exclusive use of all the water would recur, no decree could be entered fixing the rights of plaintiff, or prohibiting the defendant from interfering with plaintiff's rights. It is equally manifest that no decree determining the rights of plaintiff or protecting them against the acts of defendant could be entered which would not prejudice the other owners deriving from the prior appropriators. Suppose, for example, the court had decreed that plaintiff would be entitled to the exclusive use of all the waters of the creek for a period of one hundred and thirty-two hours and nineteen minutes, com-

mencing at 12 o'clock M. of the first day of October, 1883, and to an exclusive use of the waters for a like period commencing two hundred and thirty-nine hours and forty-one minutes after the expiration of the first period (and so on), such decree would not conclude the rights of the other owners of the use, and the result might be that the defendant would only be enjoined for periods to which others than the plaintiff would be entitled to the use of all the waters. Hence, it was the duty of the court to order the other persons interested in the use of the waters to be brought in as necessary parties to the controversy: Code Civ. Proc., sec. 389.

Judgment reversed and cause remanded, with direction to the court below to order that all persons claiming or owning rights to the use of any of the waters on Lytle creek be made parties to the action.

We concur: McKee, J.; Ross, J.

PEOPLE v. MAJORS.*

February 12, 1884.

2 Pac. 744.

Former Conviction.—An Appeal will not Lie from a Judgment upon a Plea of former judgment of conviction, nor from an order denying a motion for a new trial.

Former Conviction.—Two Men Being Murdered in Furtherance of a Conspiracy, each conspirator was guilty of the murder of each of the victims, and conviction of the killing of one is no bar to a prosecution for the killing of the other, even though both men were killed at the same time and place.

Attorney General for respondent; J. B. Lamor for appellant.

ROSS, J.—To an information filed August 27, 1883, charging the defendant with the murder of one Archibald McIntyre, in Santa Clara county, on the eleventh day of March,

*For subsequent opinion in bank, see People v. Majors, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac. 597.

1883, defendant, without a plea of not guilty, pleaded a former judgment of conviction of the same offense. Upon the plea so interposed a trial was had, and a verdict rendered for the people. Defendant then moved in arrest of judgment, and also made a motion for a new trial, both of which motions were denied by the court, and thereupon judgment was given against him on the plea. He appeals from the judgment, from the order denying his motion in arrest of judgment, and also from the order refusing him a new trial.

It is clear that there is no authority for the appeal from the judgment, nor for that from the order denying the motion in arrest of judgment. Sections 1237 and 1259 of the Penal Code read:

"Sec. 1237. An appeal may be taken by the defendant: (1) From a final judgment of conviction; (2) from an order denying a motion for a new trial; (3) from an order made after judgment, affecting the substantial rights of the party."

"Sec. 1259. Upon an appeal taken by the defendant from a judgment, the court may interview any intermediate order or ruling involving the merits, or which may have affected the judgment."

Such orders and rulings made prior to the judgment, and involving the merits, or which may have affected the judgment, from which an appeal is not in terms given, can only be reviewed on appeal from the final judgment of conviction: People v. Clarke, 42 Cal. 622. Section 1237 does not give an appeal from an order denying a motion in arrest of judgment. The appeal from the order is therefore without authority, and must be dismissed. So, too, with respect to the appeal from the judgment upon the plea of former conviction. It is obvious that such a judgment is not "a final judgment of conviction." It only determines that the defendant has not been previously convicted of the offense of which he now stands charged, leaving the question of his conviction or acquittal open, to be determined after a trial.

The appeal from the order denying defendant's motion for a new trial of the issue raised by his plea of former conviction remains to be considered. On the trial of that issue it was made to appear in evidence that the defendant was a defendant to an information filed in the same court on the 39th of March, 1883, charging Joseph Jewell, John Showers

and Lloyd L. Majors with the murder of one William P. Renowden, in the county of Santa Clara, on the 11th of March, 1883; that under that information defendant was duly convicted and adjudged guilty of murder in the first degree, and sentenced to life imprisonment in the state prison; that the facts established by the evidence given on that trial and upon which defendant was convicted were: "That said Lloyd L. Majors counseled and advised one Joseph Jewell to rob one William P. Renowden, living near Lexington, in the said county of Santa Clara, on the eleventh day of March, 1883; that on said day said Jewell repaired to said Renowden's home, taking with him one John Showers; that said Jewell and Showers unexpectedly found at the house of said Renowden one Archibald McIntyre, who was then residing with said Renowden; that in the attempt to carry out the design of robbery both said Renowden and said McIntyre were then and there, at the same point of time, to wit, about 6:30 o'clock P. M. of the eleventh day of March, 1883, killed by said Jewell and Showers; that said Majors was not present; neither did he personally participate in the said act of killing said Renowden and McIntyre, or either of them, except counseling and advising said Jewell to commit said robbery as aforesaid"; and it was further made to appear in evidence in the court below that the facts above recited "are to be adduced and proven in support of the information now pending, to which the said Lloyd L. Majors has pleaded a former conviction should the same be put in issue by a plea of not guilty."

The proposition of appellant's counsel is that as Renowden and McIntyre were killed at the same place and at the same point of time by Jewell and Showers in the attempt to rob Renowden, the killing "was, on the part of Jewell and Showers, one physical act—one mental effort," and therefore a conviction for the murder of Renowden bars a prosecution for the murder of McIntyre. For the purposes of this case we need only say that we do not find counsel's premise supported by the facts disclosed by the record. Because Renowden and McIntyre were killed by Jewell and Showers at the same place and at the same point of time, it by no means follows that their death was caused by "one physical act—one mental effort." As is well said by the district attorney, Showers may have brained one with a shotgun in the house, while Jewell

shot the other with a pistol through the heart in the yard. Both were murdered in the execution of a conspiracy entered into for the purpose of robbing one of them. The act of each conspirator in furtherance of that design was the act of each and every of the others. Each was guilty of the murder of each of the murdered men, and, of course, subject to prosecution therefor. We think this very clear.

Appeal from the judgment and from the order denying the motion in arrest of the judgment dismissed, and order denying the defendant's motion for a new trial affirmed.

We concur: McKinstry, J.; McKee, J.

LAWRENCE v. GETCHELL.*

February 12, 1884.

2 Pac. 746.

Costs.—Where the Action Involves the Title of the Land described in the pleadings, and the court decides that the plaintiff has no cause of action against the defendant, the defendant is entitled to his costs and disbursements in the action.

Cross & Simmonds for appellant; W. D. Long and J. M. Walling for respondent.

McKEE, J.—This was an action to determine the title of the plaintiffs to certain parcels of land described in the complaint and to enjoin the defendant from trespassing upon the same, and from asserting any title thereto. The court found that the plaintiffs were owners of only a portion of the land, and that they were not entitled to any relief. Upon this finding a temporary injunction, which had been issued in the case, was dissolved, and judgment was entered in favor of defendant "for costs and disbursements incurred on account of the injunction, taxed at seventeen dollars and eighty cents," and also in favor of the plaintiffs against the defendant "for

*For subsequent opinion in bank, see 4 Pac. 544, post, p. 359.

their costs and disbursements incurred in the trial of the issue of title to the real property described in the pleadings in the case, taxed at $467.25." The defendant moved to modify the decision and judgment by striking out the said judgments, and inserting in lieu thereof the following: "That the defendant is entitled to judgment for his costs and disbursements incurred in this action." This the court refused to do, and, we think, the refusal was error. For, as the action invoked the title of the plaintiffs to the land described in the pleadings, and the court decided that the plaintiffs had no cause of action against the defendant, the defendant was entitled, of course, to judgment for his costs and disbursements incurred in the trial of the action: Code Civ. Proc., sec. 1024, subd. 5, sec. 1022.

Order reversed and cause remanded, and court is directed to modify its decision and judgment as requested.

We concur: McKinstry, J.; Ross, J.

FABER v. CATHRIN.

February 12, 1884.

2 Pac. 879.

Animals.—A Land Owner Being Injured by the Trespass of sheep in possession and care of defendant, the latter, under the evidence herein, is liable therefor. Testimony showing that by reason of the injury the plaintiff's stock had to be fed with hay goes only toward showing the extent of the injury, and is properly admitted.

C. F. Irwin for appellant; George G. Blanchard for respondent.

ROSS, J.—This action was brought under the act of the legislature, approved March 7, 1878, and entitled, "An act concerning trespassing of animals upon private lands in certain counties in the state of California": Stats. 1877–78, p. 176. The act is made applicable to the township in which is

situated the land of the plaintiff, and its first and second section are as follows:

"Section 1. It is unlawful for any animal, the property of any person, to enter upon any land owned by or lawfully in the possession of any person other than the owner of such animal.

"Sec. 2. The owner of, or person who is in the lawful possession of, any land trespassed upon, in violation of this act, is entitled to recover by action, in a court of competent jurisdiction, from the owner of, or person in possession of, or person charged with the care of, the trespassing animal or animals, all damage sustained by reason of such trespass, together with costs of suit."

The complaint charges that at certain stated times the plaintiff was the owner and in the possession of a certain piece of land; that at those times the defendant was the owner, in the possession, and chargeable with the care of certain sheep, which sheep then entered and trespassed upon the land of the plaintiff and injured and destroyed the grain, hay, and grass thereon being and growing, to the plaintiff's damage in the sum of one thousand dollars. If the averments made by the plaintiff were true, the law quoted made the defendant liable to her. And that the averments were true, except as to the amount of damage sustained by the plaintiff, was found by a jury upon evidence sufficient to sustain the verdict. The fact that the damage done to the plaintiff by defendant's sheep had made it necessary for the plaintiff to feed her own stock with hay was first brought out by defendant on the cross-examination of one of the plaintiff's witnesses. Besides, there was no attempt on the part of the plaintiff to show the value of the hay so fed to her stock, and the testimony could only have gone toward showing the extent of the injury done by defendant's sheep to the plaintiff's hay and grain.

In view of the evidence in the case, there was no error on the part of the court in refusing the instructions requested by the defendant.

Judgment and order affirmed.

We concur: McKinstry, J.; McKee, J.

ROUGH v. BOOTH.*

February 23, 1884.

2 Pac. 91.

Appeal—Judgment-roll.—The Petition and Bond for Removal, and Order Thereon, are not a part of the judgment-roll, and the bond not being signed by the principal, it is insufficient. The judgment must therefore be affirmed.[1]

W. H. H. Hart for appellant; H. B. Gillis and Calvin Edgerton for respondent.

By the COURT.—The appeal in this case was taken from the judgment alone. On the appeal the plaintiff seeks to review an order of the court below denying his motion that the cause be transferred to the federal court. Under section 670, Code of Civil Procedure, the petition and bond for transfer, and the order thereon, do not constitute a part of the judgment-roll, and there being no bill of exceptions, and no exception, we have nothing before us for consideration but the roll itself. Even if the proceedings for removal were before us for decision, we should consider the bond insufficient, it not being signed by the principal. This was one of the reasons stated by the court for denying the motion, and we think the ruling correct.

No error appearing, the judgment is affirmed.

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* Reversed in bank. See 65 Cal. xx, 3 Pac. 805.

1 Cited in Meesley v. Southern Pac. Co., 35 Utah, 263, 99 Pac. 1067, holding that the petition and bond for removal are not properly part of the judgment-roll.

SHAEFFER v. MATZEN.

February 25, 1884.

3 Pac. 95.

Ejectment.—The Legal Title Being Opposed Only by a Mere Naked Possession, the holder of such title is entitled to the possession.

J. H. McKune for appellant; Long, Lott & Belcher for respondent.

By the COURT.—The defendant Stillinger does not appear to have had any claim to the demanded premises beyond what his naked possession gave him; and at the time of the commencement of this action the plaintiff had the legal title, and was entitled to the possession of said premises. This is sufficiently apparent, although somewhat obscured by the finding of a great number of irrelevant facts.

Judgment affirmed.

PEOPLE v. JORDAN.*

February 26, 1884.

3 Pac. 101.

An Appeal will be Dismissed When Previous Appeal from same judgment has been perfected.

By the COURT.—This is an appeal by the people from a judgment or order in favor of defendant on a demurrer to the indictment: Pen. Code, 1238. The notice of appeal was served and filed on the tenth day of November, 1883. If the judgment or order was appealable the people had perfected an appeal from the same on the twenty-sixth day of October, 1883.

The appeal must therefore be dismissed.

*For subsequent opinion in bank, see 65 Cal. 644, 4 Pac. 683.

PEOPLE v. BLAKE.

February 28, 1884.

3 Pac. 102.

Dedication of Street.—The Finding That the Defendants Neither have nor had Any Title to the land is sustained by the evidence, and, this being so, it is immaterial to them who the owners were who dedicated it for a street, and they cannot object that there is no finding by the court as to who such owners were.

C. A. & C. Tuttle and Jarboe & Harrison for appellants; George E. Whitney for respondent.

MYRICK, J.—The court below found that the land in controversy constitutes a portion of a public street, which had been wrongfully and unlawfully obstructed by the defendants, and that the defendants had and have no right or title thereto. In arriving at the conclusion that the land was a portion of a street, the court found that the same had been dedicated as a public street by the owners, and had been, with the permission of the owners, used by the public as a public street and highway from the beginning of the year 1853 to the end of the year 1859. The defendants object to the sufficiency of the findings, in that the court did not find who were the owners who thus made the dedication. If the defendants or their grantors have and had no interest in the premises, and no title thereto, it is an immaterial fact to them who were the owners.

The finding that the defendants had and have no right or title to the land is sustained by evidence, viz., the evidence of surveyors, tending to show that the quantity of land specified in the subdivisions of tract D, as per map of the subdivisions, is contained in the tract, placing the southern line of the tract eighty feet north of the northern tier of blocks, as delineated on the Kellersberger map; there is evidence tending to show that from the fence built along the southern line of subdivision No. 9 to the northern line of the so-called Fourteenth street, the distance is found as delineated on the map of tract D; there is evidence tending to show that the persons who caused the Kellersberger map and survey to be made caused a street of the width of eighty feet to be laid out, sur-

veyed and staked over and upon the premises in controversy; there is evidence tending to show that the northern tier of blocks, as delineated on the Kellersberger map, does not reach within eighty feet of the southern line of tract D, and, if that be true, the partition deed between the original owners did not include the premises, and they were not included in the deed from J. K. Irving to Goggin of subdivision No. 1 of tract D, and therefore not included in any deed conveying or purporting to convey the title of the original owners. The Kellersberger map delineates blocks and streets from the waterfront to the north line of the northern tier of blocks, giving the distance as three thousand eight hundred and fifteen feet; the partition map gives the westerly line of the space marked thereon "Oakland" as sixty-three chains—i. e., four thousand one hundred and fifty-eight feet; this westerly line is considerably less than the distance, as shown on the map, from the waterfront to the northerly line of the space marked "Oakland," thus showing (at least sufficiently certain to sustain the finding) that the Kellersberger map did not embrace all the land between the waterfront and the tract D, as partitioned to J. K. Irving.

In this view of the case the other matters assigned as error become immaterial.

This case was here on a former appeal, at which time a new trial was granted: 60 Cal. 497. In the consideration of that appeal it was assumed that the north line of the blocks as delineated on the Kellersberger map corresponded with the south line of tract D; the discrepancy now apparent was not considered. This is mentioned to explain what would otherwise appear to be an inconsistency between the facts appearing on that appeal and on this. In the partition map "Oakland" is delineated as lying immediately south of tract D; and probably this fact led to the supposition that "Oakland" of the partition map corresponded with the Kellersberger map.

The judgment and order are affirmed.

We concur: Thornton, J.; Sharpstein, J.

I concur in the judgment: Morrison, C. J.

GILMAN v. CURTIS.*

February 28, 1884.

3 Pac. 114.

Life Insurance—Assignment—Suit for Reassignment.—Where a plaintiff, while owner of a policy of life insurance, has assigned the the same to the defendant, to secure advances made such defendant, and afterward sues for a reassignment of the policy in order to collect it from the insurance company, the court should not adjudge the plaintiff the owner of the policy and entitled to receive the whole amount from the company, for the interest of the plaintiff is only what remains after the advances have been satisfied. The defendant has the legal title, and cannot be made to surrender it until his advances have been paid.

H. G. Siebert and G. F. Sharp for respondent.

ROSS, J.—To this suit Gilbert Curtis and the Ætna Life Insurance Company were originally made defendants. The controversy grows out of a policy of insurance issued by the company upon the life of one A. W. Tucker. The complaint charges that the policy was issued upon the life of Tucker and delivered to one Esther Cordelia Curtis, who, it is alleged, paid the premiums thereon. It is not alleged to whom the policy was made payable. There are, however, allegations and findings to the effect that Esther Cordelia Curtis assigned the policy to the plaintiff, who subsequently caused the same to be assigned to the defendant Gilbert Curtis as security for certain advances to be made by him for and on account of the said Esther Cordelia Curtis. The findings are that the advances so made, for the security of which Gilbert Curtis received the policy, amounted to $4,071.21. There is nothing in the case to show that the plaintiff became personally responsible for those advances. The prayer of the complaint is for a decree to the effect that the plaintiff is the owner of the policy, and entitled to collect and receive from the insurance company the money for which it was issued, the insured having deceased; that the interest of the defendant Gilbert Curtis therein be determined; that he be required to assign and deliver to the

*Reversed in bank. See 66 Cal. 116, 4 Pac. 1094.

plaintiff the policy, and, he failing to do so, that the clerk of the court execute such assignment, and that both defendants be restrained from disposing of the policy or the moneys mentioned therein to others than the plaintiff. There was also a prayer for general relief. The record discloses no service or process on or appearance by the Ætna Life Insurance Company, but the judgment entered in the cause recites that the action was "dismissed as against the Ætna Life Insurance Company and the intervener herein." The sole parties to the suit are, therefore, the plaintiff and the defendant Gilbert Curtis.

The following is the decree entered in the court below:

"Now, therefore, by reason of said verdict and finding, it is ordered that judgment be entered herein in favor of the plaintiff, and against the said Gilbert Curtis, as of the date of said verdict, to wit, on the ninth day of May, 1881.

"It is therefore ordered, adjudged and decreed that the plaintiff is the owner of the policy of insurance, No. 81,308, issued by the Ætna Life Insurance Company upon the life of A. W. Tucker, deceased, which said policy of insurance was issued upon the life of said A. W. Tucker for the sum of $10,000, and which was duly assigned, transferred and set over to the plaintiff, as alleged in plaintiff's complaint.

"That while the plaintiff was the owner of said policy of insurance she assigned and caused the same to be transferred to the defendant Gilbert L. Curtis, in trust, to secure future advances to be made by the defendant Gilbert L. Curtis to pay Judge Swift and the Sacramento Bank certain liens and claims that they had, or claimed to have, upon said policy of insurance.

"And the jury having found, by their verdict, that the defendant Gilbert L. Curtis had, at the date of their said verdict, advanced the sum of $4,071.21, which amount they found to be due him for money so advanced as aforesaid, the said defendant Gilbert L. Curtis is therefore entitled to receive said amount so found to be due, less the cost of suit; and that the said policy of insurance is subject to said trust and payment of said sum of $4,071.21, which amount is to be paid to the defendant Gilbert L. Curtis when said policy shall be paid by the Ætna Life Insurance Company.

"And the plaintiff, upon the payment of the said sum, is entitled to have and receive from the said Gilbert L. Curtis a surrender and reconveyance of said policy, and that the said plaintiff is entitled to receive from the Ætna Life Insurance Company the whole amount due upon said policy. And the plaintiff is entitled to have and recover from the said Gilbert L. Curtis her costs in this action, levied at the sum of $519.32."

The decree as entered is, we think, obnoxious to some of the objections urged by counsel for appellant. As the jury found—and the court approved and adopted the finding—that the plaintiff assigned the policy to defendant to be held by him as collateral security for certain advances to be, and which were, made by him, the legal title to the policy passed by the assignment to the defendant. The court should not, therefore, have adjudged the plaintiff the owner of the policy, and entitled to receive from the insurance company the whole amount due upon it. The interest of the plaintiff in the policy is in what remains of it after the advances, for the security of which it was assigned, have been satisfied. To that excess plaintiff is equitably entitled. But since the defendant was, by the assignment, invested, not only with a lien upon the policy, but with the legal title thereto, as security for his advances, it is clear that he cannot be made to surrender it to the plaintiff until the advances made by him are repaid; and since there is no personal obligation on the plaintiff to repay the advances, and the policy does not appear to have been paid, we do not see what other decree can properly be entered on the findings than one declaring the interests of the respective parties in and to the policy and moneys growing out of it, and directing the defendant to seek the enforcement of its payment, and, in the event of its payment, that the defendant, after deducting the amount of the advances for the security of which the policy was assigned, pay the remainder to the plaintiff. The plaintiff is also entitled to costs of this suit.

Cause remanded, with directions to the court below to modify the judgment so as to accord with the views above expressed.

We concur: McKinstry, J.; McKee, J.

CHALMERS v. CHALMERS.

February 28, 1884.

3 Pac. 104.

Mortgage.—The Evidence Supports the Finding That the Mortgage herein is not affected by the heretofore unknown rights of the interveners.

W. L. Dudley, Charles F. Irwin and George J. Carpenter for appellants; George G. Blanchard for respondent.

By the COURT.—This action is similar to that of Stockton Bldg. & L. Assn. v. Chalmers, 65 Cal. 93, 3 Pac. 101, except that this is to foreclose the junior mortgage. The court found that the plaintiff had no knowledge of the alleged rights of the interveners until the complaint in intervention was filed; and there is evidence sufficient to justify the finding.

Judgment and order affirmed.

SWEETSER and Others v. DOBBINS.*

February 28, 1884.

3 Pac. 116.

Trial.—The Findings of a Jury on Special Issues are Merely Advisory to the court, and, if adopted, are the findings of the court. If a general verdict be rendered by the jury, the court can set it aside and find the facts and render judgment on the testimony taken, and in case of a general verdict must, notwithstanding the verdict, find the facts.

Equity—Verdict of Jury Advisory Merely.—In cases at law the verdict of a jury is final, unless set aside; but in equity it is merely advisory, and may be adopted or not, as the court sees proper.

Equity—Sufficiency of Evidence.—Where in an Equity Case, if Tried Alone by the Court, the evidence would be required to be clear

*For subsequent opinion in bank, see Sweetser v. Dobbins, 65 Cal. 529, 3 Pac. 116.

and convincing, the same rule must apply to the jury as to evidence submitted to them in the same case. A mere preponderance of testimony will not be sufficient.

Equity.—There is No Error in Regard to the Admission of the Evidence herein, and it does not appear that the judge assumed that he was conclusively bound by the verdict of the jury, though he arrived at the same conclusion.

George A. Lamont for appellants (George A. Nourse, of counsel); J. McKenna, Wendell & Kelley and A. J. Dobbins for respondent.

MYRICK, J.—The complaint in this case was filed to obtain a decree reforming a deed executed by defendant to plaintiffs' testator, so as to include a tract of land not included therein, and that said tract be conveyed to them in their representative capacity. The plaintiffs alleged that by the agreement of their testator and the defendant the tract was agreed to be embraced in the deed, and was omitted therefrom by the mistake and inadvertence of the scrivener. The defendant denied such agreement and mistake, and alleged that the deed contained all the land which he had agreed to convey. Special issues were submitted to a jury, and the verdict was, in effect, in favor of defendant. The court filed findings as to all the facts in issue, in which, after reciting the fact that a jury had been impaneled to try special issues, and had rendered a verdict, it is stated: "Now, from said verdict and the testimony adduced in said cause, after due consideration, the court finds the following facts," etc. On this appeal points are presented by the plaintiffs, viz.:

1. The court instructed the jury that as to the first issue presented to them (which was merely as to whether the land of defendant was divided into seven or eight parcels) the rule was that a preponderance of evidence should govern them; but as to the other evidence (which related to the alleged agreement and mistake) a different rule obtains from that in ordinary civil actions; that to establish a mistake in the execution of a written instrument the evidence as to the mistake must be clear and convincing; that the evidence must be more than mere preponderance; it must be clear and convincing.

The plaintiffs allege this instruction to be error; that subdivision 5, section 2061, Code of Civil Procedure, furnishes the rule in all civil cases; that "when the evidence is contradictory the decision must be made according to the preponderance of evidence"; that the instruction gave one rule to one class of civil cases, viz., an action to reform an instrument, and another rule to other civil cases. It was decided by this court in Bates v. Gage, 49 Cal. 126, that the findings of a jury on special issues are merely advisory to the court, and, if adopted by it, are the findings of the court. In Wingate v. Ferris, 50 Cal. 105, it was held that if a general verdict be rendered by the jury, the court can set aside the verdict (without motion for a new trial), and find the facts, and render judgment on the testimony already taken; and in Brandt v. Wheaton, 52 Cal. 430, it was held that in case of general verdict the court must, notwithstanding the verdict, find the facts.

If it be a correct principle that a general verdict may be disregarded by the court, and a decision be rendered by it on the testimony already given, and if a verdict on special issues is merely advisory, to be adopted by the court or not, as it is convinced, how far was it error for the court to instruct the jury as it did, conceding, for the purpose of this case, that the statute above quoted furnishes the rule for all civil cases? The court found all the facts. It found that the agreement alleged in the complaint was not made; it found that the agreement alleged in the answer was made; it found that no parcel of land was omitted, through mistake or inadvertence, to be mentioned or described in the deed; it found that the deed included all the land intended to be conveyed, and correctly expressed the intention of the parties to the same. As above stated, the court said, as preliminary to the facts: "Now, from said verdict, and the testimony adduced in said cause, after due consideration, the court finds," etc. What answer of the jury did the court rely upon and adopt as the basis of its findings, and what finding was based on the determination of the court from the testimony? This does not appear. It does not appear that the court adopted any portion of the verdict, as distinguished from exercising its own judgment. It is true, the court said, "from said verdict"; but it also said, from "the testimony

adduced in said cause, after due consideration, the court finds."

The court had authority to rely on its own opinion in regard to the weight of evidence, and in doing so it is to be presumed that it was governed by proper and legal rules. According to the section of the code above referred to, the jury is to be instructed by the court, "on all proper occasions," that, when the evidence is contradictory, the decision must be made according to the preponderance of evidence. This evidently refers to all cases where the decision of the jury is final as to facts. In cases at law the decision of the jury is final, unless set aside; but in equity cases it is merely advisory, and may be adopted or not, as the court shall be convinced. If this case had been tried by the court without a jury, there is no doubt that the court would have been governed by the rule that the law presumes the deed to speak the intention of the parties, and, to overcome such presumption, the plaintiffs would have been required to show, by proof clear and convincing, that it did not so speak. It must therefore necessarily follow, in cases where a verdict is but advisory, that the same rule should govern a jury. It cannot be that the legislature intended one rule regarding the weight of evidence to apply to a court and another rule to a jury in arriving at a decision in the same case. The court was not bound to enforce upon the jury a rule which it was not bound in law or in conscience to apply to its own action.

2. It was not error for the court to caution the witness Lamont not to give evidence of facts based on knowledge derived from Pierce (plaintiff's testator) or by hearsay from others; nor to strike out the evidence based thereon already given.

3. The witness Lamont was asked whether or not he would have attached certain property if he had not supposed it was mortgaged, and an objection to the question was sustained. Conceding it to be possible for a person to tell what he would or would not have done regarding a transaction now passed, we do not see that it could have affected the verdict. The matter for consideration was, what did he do—not what he would have done.

4. We see no error in permitting the cross-examination of the witness Lamont to include the original complaint.

5. A witness, Rush, was examined as to a conversation had by him with the defendant. He had not a distinct recollection of what the defendant said, and on cross-examination was asked as to the impression left on his mind from what was said. If the court erred in overruling the objection, the error did appellants no harm, because the answer was favorable to them.

6. The mortgage first executed by the defendant was a portion of the transactions between the parties culminating in the deed in question, and it was admissible in evidence.

7. It was not error to admit Coghlan's testimony as to the data had for drafting the mortgage, made February 1, 1876; nor—

8. To allow Coghlan to testify he had no doubt that he had compared the instrument with the data from which it is drawn.

9. The witness Lamont, called for plaintiffs, had testified as to conversations had by him (on behalf of Pierce) with the defendant, and negotiations between them, and had given his version of those conversations and negotiations. He testified that defendant's only proposition was, "I will give you a deed to the ranch, and you give up all my papers." The defendant, on his own behalf, testified as to an additional offer made by him during those conversations and negotiations. Lamont was called in rebuttal to deny such offer, and an objection thereto was sustained. The witness having already testified as to the conversations, and having stated what was defendant's only proposition, thus saying there was no other, it was doubtless in the discretion of the court to permit or refuse a further examination relating thereto.

10. As to the tenth point, we cannot see that the jury was misled or confused by the nature of the instructions.

11. The appellants complain that the judge of the court below assumed that he was conclusively bound by the verdict of the jury. It does not appear that the judge came to a different conclusion from the testimony than that arrived at by the jury. The judge says: "In this case there is a contradiction of witnesses—as decided a conflict as I have ever seen," but he does not say that he would have decided other than as the jury did; therefore, no error is manifest. In ruling on plaintiff's motion to set aside the verdict and for

judgment, the court said: "I do not see any circumstance in this case by which I feel that I am warranted in setting aside the verdict"; thus, in effect, expressing his view of the evidence.

12. The court found that defendant was not in embarrassed circumstances, pecuniarily. Objection is made that this finding is not sustained by the evidence. Granting that it is not sustained, yet, as a fact to be found, it was an immaterial matter. Proof of his pecuniary circumstances may have had some bearing on the case as evidence, but it was not an ultimate fact. The ultimate facts were whether or not the parties had agreed that the omitted tract should be included in the deed, and whether the omission was by mistake.

Judgment and order affirmed.

We concur: Sharpstein, J.; Thornton, J.

MARTIN v. JACOBS.

February 28, 1884.

3 Pac. 122.

Animals.—The Owner of Cattle and Horses is Responsible for the Willful Entry therewith upon lands belonging to another **and in** his possession.

Animals—Trespass—Lien.—The Rule as to Notice to the Owner, where a lien is asserted upon such cattle, etc., does not apply to this case.

C. P. Sprague for appellant; W. B. Treadwell for respondent.

ROSS, J.—The statute under which this action was brought —act of March 20, 1878 (Stats. 1877–78, p. 360)—makes the defendant liable for the acts charged in the complaint and proved and found against him in the court below; that is to say, the willful entry by the defendant, with cattle and horses, upon land belonging to and in the possession of the plaintiff and depasturing the same to plaintiff's damage. The first section of the act reads:

"If any horse, mare, mule, jack, jenny, hog, sheep, goat, or herd of neat cattle, or any number of such animals, shall break into or enter upon any private lands, whether inclosed or not, the owner of or person keeping, harboring, or controlling such animals shall be liable to the owner or possessor of such lands for the amount of all damages caused by such trespass: or, when the trespass is continuing in its nature, for all damage caused by such continuing trespass; such damages to be recovered in a civil action brought for that purpose."

In addition to the remedy given by the section just quoted, subsequent sections of the act provide for a lien upon the trespassing animals under certain circumstances, and when such lien is asserted, for notice to the owner of the stock. But those provisions do not apply to the present case. The evidence is sufficient to sustain the findings.

Judgment and order affirmed.

We concur: McKinstry, J.; McKee, J.

Ex Parte MAKINNEY.

March 8, 1884.

3 Pac. 253.

Jury Fees—Certificate for Payment.—Where a party to a suit is ordered to pay the jury fees, the court has not the power to order the clerk to issue certificates for their payment out of the county treasury, upon the mere neglect, failure, or refusal of the party to comply with the order by paying as required.

Habeas corpus.

J. M. Lesser for petitioner.

THORNTON, J.—Luke Lukes sued J. Bernheim and others in the superior court for the county of Santa Cruz, and on his demand a jury was called and impaneled. The trial of the cause proceeded for five days before the court and jury, and the jury, failing to render a verdict, was on the 19th of

October, 1883, discharged. The court entered an order that the plaintiff pay the jury fees, amounting to one hundred and twenty dollars, in said action, and that all proceedings be stayed in the action until the fees are paid by plaintiff. The court further directed, in this order, that if the fees above mentioned were not paid by plaintiff that the clerk issue a certificate to all of the jurors of the time and mileage to which each juror is entitled to pay, and the same be paid out of the county treasury, as is provided in section 28 of "An act to regulate fees of office," etc., approved March 5, 1870 (Stats. 1869–70, pp. 148, 177). It further appears that the clerk, petitioner here, refused to obey this order, whereupon the court adjudged him guilty of contempt and ordered that he be imprisoned until he comply with it.

The petitioner, Makinney, applies to me to be discharged from this imprisonment. I think that the court in making the order exceeded its power. Such order is only authorized under certain special circumstances, and, when those circumstances do not exist, the court has no power to make it. The proceedings under the statute of 1870, in regard to jury fees, is in its nature special, and is not within the general jurisdiction of the court. It does not appear that Lukes is without means and unable to pay this money. As the case is presented here, it is one of neglect or failure to pay by one who is ordered to pay. It may be that he had abundant means to pay, and willfully and obstinately refused to pay. Under these circumstances, the court had no power to require the clerk to issue certificates as required in the order. It may be that if the court had exercised the powers it had a right to employ—directed a writ of execution to be issued on the order that the plaintiff pay, against the property of plaintiff, had had it placed in the hands of the sheriff, who had made a faithful and diligent effort to make the money, and had failed—that the court might then order the clerk to issue such certificates; but certainly it had no power to make such order on the mere failure, or neglect, or refusal of the plaintiff to comply with the order by paying as required.

As the court was unauthorized by law to make the order as to the issuance of the certificates required by it, the imprisonment of the petitioner was without authority, and he must, therefore, be discharged; and it is so ordered.

NISSEN v. BENDIXSEN.

No. 9088; March 14, 1884.

3 Pac. 404.

Appeal—Dismissal for Want of Notice.—When the original transcript does not show that the notice of appeal was served on plaintiff's attorney of record, and a motion to dismiss on that ground is made, such motion may be overruled if the defendant, upon leave, files a certificate of the clerk of the court below showing that proof of service of such notice is on file in the clerk's office.

S. M. Buck for appellant; J. J. De Haven for respondent.

By the COURT.—The original transcript did not show that the notice of appeal was served on the plaintiff's attorney of record, and a motion to dismiss on that ground was made by said attorney. When the motion was called up, the defendant's attorney suggested diminution of record, and asked and obtained leave to file a certificate of the clerk of the court below showing that proof of service of said notice on plaintiff's said attorney of record is on file in the office of said clerk.

Motion to dismiss denied.

PEOPLE v. GRIDER.

March 14, 1884.

3 Pac. 492.

Larceny—Intent.—In a Prosecution for Grand Larceny, if the act of taking the property is admitted, but a felonious intent denied, the question of intent is one for the jury.[1]

APPEAL from the Superior Court of Sonoma County.

The defendant in this case was accused of the crime of grand larceny. Defendant pleaded not guilty. He admitted

[1] Cited in Territory v. Dowdy (Ariz.), 124 Pac. 895, and followed, with the result that the judgment below was reversed because of the court failing to submit the question of intent to the jury.

the taking of money from the pocket of one Carmody, but denied any intent to steal the same. Evidence as to this intent was introduced on both sides. The court ruled that the question of intent was one for the jury, and instructed them if they found a felonious intent. to render a verdict of guilty. The jury found defendant guilty, and from the above ruling and instruction defendant appealed.

Henley & Oates for appellant; Attorney General for respondent.

MYRICK, J.—The information accused the defendant and one Donovan of the crime of grand larceny. That the defendant Grider took the money from the pocket of Carmody when the latter was intoxicated is admitted. The proposition of Grider was that certain persons engaged in a "game" were endeavoring to obtain the money by means of the game, and that he (Grider) took it as a friend of Carmody to protect it for him. On the other hand, the theory of the prosecution seems to have been that Grider took the money feloniously, with intent to steal it, making use of the other idea as a pretext or as an afterthought. In that view the ruling of the court and the instructions were correct.

No error appearing, the judgment and order are affirmed.

We concur: Thornton, J.; Sharpstein, J.

HAWES v. GREEN.

March 17, 1884.

3 Pac. 496.

Appeal.—Where There is a Failure to Find on a Material Issue, judgment will be reversed.

APPEAL from the Superior Court of San Mateo County.

J. C. Bates for appellant; Winans, Belknap & Godoy for respondent.

By the COURT.—The defendant, sheriff, in his answer justified the taking of the property in controversy by virtue of

an attachment issued against the property of plaintiff's vendor. There is no finding on the issue raised by the answer as to the averments in justification; the findings are silent upon this subject.

Judgment and order reversed.

PEOPLE ex rel. DOUGHERTY v. BOARD OF ELECTION COMMISSIONERS, etc.

No. 9310; March 17, 1884.

3 Pac. 412.

Municipal Corporations.—The Office of "Supervisor, First Board," does not exist in the city and county of San Francisco.[1]

John J. Coffey for appellant; Wm. Craig for respondent.

MYRICK, J.—The petitioner, at a general election held in the city and county of San Francisco, November 7, 1882, received votes for supervisor, first board, and he claims that under the clause of section 7, article 11, of the constitution of 1879, which reads as follows: "In consolidated city and county governments of more than one hundred thousand population, there shall be two boards of supervisors or houses of legislation," etc., he was elected a member of the first board of supervisors, and is entitled to a certificate of election; that the clause above quoted is self-executing and requires no legislation. The court below held that the office for which the votes were cast does not exist in said city and county. This court had occasion to consider this question in Desmond v. Dunn, 55 Cal., and its views thereon will be found on pages 248, 249. The consolidation act of the city and county of San Francisco will (so far as the present question is concerned) remain in

[1] Cited and followed in People v. Gunst, 110 Cal. 452, 42 Pac. 964, denying the contention of the petitioners there who claimed to be elected members of such "first board."

Cited, approved and followed in People v. Pond, 89 Cal. 143, 26 Pac. 649, holding that the office of supervisor of the first board does not exist in San Francisco.

force until changed or superseded by proceedings under article 11 of the constitution.

Judgment affirmed.

We concur: Thornton, J.; Sharpstein, J.; Ross, J.; McKinstry, J.; Morrison, C. J.

WIDEMAN v. FRANKS.

March 21, 1884.

3 Pac. 494.

Fraudulent Sale.—Evidence Held Sufficient to Justify a Finding that plaintiff's title was derived under a fraudulent sale, and void as to creditors.[1]

APPEAL from the Superior Court of Monterey County.

This was an action by plaintiff to recover the value of certain sheep, of which he claimed to be the owner, through purchase from one Alvarado. The defendant, as sheriff, justified under an execution against said sheep as the property of said Alvarado. Evidence was offered to show that the transfer from Alvarado to plaintiff was fraudulent. The court found the transfer to be fraudulent, and rendered judgment in favor of the defendant. Plaintiff appealed.

A. S. Kittredge for appellant; D. M. Delmas for respondent.

By the COURT.—We think the evidence is sufficient to justify the finding that the transaction between Alvarado and plaintiff was fraudulent and void as to the creditors of the former.

Judgment and order affirmed.

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[1] Cited and followed in Kelly v. Murphy, 70 Cal. 363, 12 Pac. 468, which holds delivery and continued change of possession vital to a valid sale.

HACKLEY v. CRAIG.

March 21, 1884.

3 Pac. 494.

Appeal.—The Supreme Court has No Jurisdiction Over an Appeal from a judgment of the superior court affirming a judgment in the justice's court for a sum within its jurisdiction.

This was an action originally commenced in the justice's court of the city and county of San Francisco. Judgment was rendered for the plaintiff for the sum of one hundred and eighty dollars, with interest and costs. Defendant appealed to the superior court, and this judgment was there affirmed. An appeal is taken from this judgment of the superior court.

J. H. Meredith for appellant; York & Whitworth for respondent.

By the COURT.—This court has no jurisdiction of this appeal. Appeal dismissed.

KEATING v. EDGAR, Auditor, etc.

No. 9260; March 29, 1884.

3 Pac. 594.

Mandamus.—Findings Held to Support the judgment.

APPEAL from the Superior Court of the City and County of San Francisco.

The facts are stated in the dissenting opinion of Thornton, J.

William Craig for appellant; Scrivner & McKinne, Talcott & Crockett and Robert Crockett for respondent.

By the COURT.—The only question presented by the record on this appeal is whether the findings support the judgment. We think they do

Judgment affirmed.

We dissent: McKinstry, J.; Ross, J.

THORNTON, J., Dissenting.—I dissent. This is an application for a writ of mandate to be directed to William M. Edgar, auditor of the city and county of San Francisco, commanding him to audit a claim of the petitioner, Keating. The proceeding was instituted in the superior court for the city and county of San Francisco, where judgment was rendered for the applicant, from which the defendant appeals.

The case is substantially as follows:

The applicant was awarded a contract, as the lowest bidder, for certain work to be done on the new city hall. The applicant entered into a contract; performed the work according to such contract. The lines, levels and heights referred to in the contract were furnished him after considerable delay by one Clifford, then the architect of the new city hall, whose duty it was to furnish them. At or about the time that the applicant had finished the work aforesaid, "in accordance with the lines, levels, and heights as aforesaid, furnished by said architect Clifford, the said Clifford was discharged for incompetency from his position and place as such architect," and he thereupon ceased to act. Thereafter, one Hatherton was duly appointed architect for the new city hall in the place of Clifford, and entered on the duties of his office. "That said Hatherton, after assuming the duties of his position as such architect, and after he had so entered into the said office or place, discovered and ascertained that the lines, levels and heights so furnished to the petitioner as said contractor by said Clifford, as aforesaid, were erroneous, and that the work done and performed by petitioner according to the lines, levels and heights, so as aforesaid furnished by said architect Clifford, would not answer the purpose or purposes for which the same was intended or designed, and was not in accordance with the work called for under said contract and the specifications thereto attached, and thereupon the architect Hatherton

furnished to said petitioner, as such contractor, new lines, levels and heights, and required your petitioner, as such contractor, to remodel and move the said foundations, and replace them in accordance with the lines, levels and heights so furnished by said Hatherton; that by the terms of the said contract it is provided that any and all work so performed by said contractor shall be done and completed in a proper and workmanlike manner, and to the satisfaction of the architect and the superintendent; that said architect was dissatisfied with and refused to approve the work so done and completed by said petitioner, in accordance with the lines, levels and heights so furnished by the said Clifford, until he had completed the work specified in said contract by the lines, levels and heights so furnished by the said Hatherton; that said contractor did remodel said work and foundations in accordance with the instructions and command and to the satisfaction of said Hatherton, at a great additional expense to himself; that the work and labor performed by relator, under the instructions of said architect Clifford, was well and faithfully done, and any and all imperfections in said work was wholly due to and caused by the mistake or incompetency of said architect Clifford; that when the work and labor so to be done and performed by petitioner, as such contractor, had been carefully, well and skillfully done, in accordance with the lines, levels and heights so as aforesaid furnished by said Hatherton, relator was paid only the original amount provided in said written contract to be paid." Afterward, the applicant presented to the board of new city hall commissioners his demand for nine hundred and fifty dollars (which demand is the one herein sought to be audited), "for damages actually suffered by him by reason of the above-mentioned facts, which said demand was, by a majority of the board, allowed and ordered to be paid." The defendant refused to audit the demand.

The facts above stated are so found by the court. We are of opinion that the court below erred in rendering judgment for the petitioner. It was provided by the contract that the lines, levels and heights were to be furnished by the architect, and that the contractor must observe them. The contract binds the contractor "to set out the lines and levels for all the works, and must be responsible for the correctness of such

setting out." These lines, levels and heights were furnished by the architect; the work was done by Keating in accordance with them and with the terms of his contract. It was the duty of the architect, when the work was so done, to have approved it and to have granted his certificate. Nevertheless, the succeeding architect refused to approve the work and grant his certificate until the work was done according to the lines, levels and heights furnished by him.

When the architect Hatherton refused to do what, under the facts found, it was his bounden duty to do—that is, approve the work and grant his certificate to the applicant, that such applicant might get his pay—the only course left open for the applicant was to take steps to compel him to do so. This he might have done, under the facts of the case, by an application to the proper judicial tribunal to compel the architect to do what the law made it his duty to do. Having failed to do this, and yielding to the demands of the architect that he should remodel the work, which he did at great expense, does not and cannot enlarge his rights. The architect had no right under the law to impose any such terms on a contractor who had done all that his contract required him to do. Such demands were unjust, illegal and arbitrary on the part of the architect, and the law did not require a submission to them by the applicant. When the work was completed the board of commissioners could only allow to him what it did allow, viz., the original amount provided in the written contract to be paid. This, it is found, was paid him, and under the contract and the facts found this was all the law allowed him, and all the law justified the board in allowing him. The statute is explicit in its requisition: "Nor shall a contractor be allowed a claim for work done or material furnished not embraced in his contract": Stats. 1875–76, sec. 14 (Act of March 24, 1876, p. 465). If the board had allowed a sum greater than that agreed by the contracting parties to be paid when the work was performed, such action would have been unauthorized, in conflict with the provisions of the statute just above cited and an inexcusable dereliction of duty on the part of its members. If, after the completion of the contract in accordance with the directions of the architect Clifford, it became necessary for any reason to remodel the work, or have it altered in any respect, it should have been

let to the lowest bidder, by the board, under call for bids, in accordance with the requirements of the statute which invested the board with all the powers they had: See section 14 of statute above cited. The board could not have work done without a contract regularly awarded and entered into, and after it was done allow its value. This was substantially forbidden by the statute. We see nothing in the statute, under which the board of commissioners acted, which authorized them to allow any claim for damages, whether for delay on the part of the architect or on any other ground. We have examined the statute, and can find no such power vested in the board by the act: See Act of March 24, 1876 (Stats. 1875–76, p. 461). Further, the consequences of such delay is provided for in the contract. It is stipulated therein that if the work of the contractor is delayed by the action of the architect and other causes specified, the contractor should be entitled to an extension of time for the performance of his work proportionate to the delay so caused. It is true that by section 10 the board is authorized to allow claims, but manifestly the claims here alluded to are those which the board is called to pass on for work done or materials furnished under contracts awarded and entered into under the provisions of the law from which such board derived its being and its powers. The board had no power to make this allowance to Keating, and such allowance was null. Therefore, the defendant acted properly in refusing to audit such claim, and the application of the petitioner Keating should be denied.

COLLINS v. FROST and Others.

No. 7653; April 1, 1884.

3 Pac. 608.

Trover and Conversion.—Evidence Held to Support the findings in action for conversion.

APPEAL from the Superior Court of Santa Clara County.

This was an action for damages for conversion of certain barley. One of defendants, as sheriff, justified under an exe-

cution duly issued. The other defendant claimed said property under the same execution, issued against said barley, as the property of one Murphy. Evidence was duly introduced of the facts, and the court found said execution illegal, said barley being the property of plaintiff and not of said Murphy, and thereon rendered judgment for plaintiff. Defendants appealed.

C. C. Stephens and R. B. Moyes for appellant; W. H. Collins for respondents.

By the COURT.—The findings are supported by the evidence; no error appears in the record. It appearing to us that the appeal was taken for delay, the judgment and order are affirmed, with seventy-five dollars damages.

PEOPLE v. CARTY.

April 3, 1884.

3 Pac. 609.

New Trial.—Newly Discovered Evidence is a ground for a new trial.

APPEAL from the Superior Court of the City and County of San Francisco.

The defendant in this action was indicted and convicted of manslaughter. The defendant then moved for a new trial, on the ground of newly discovered evidence, asking time and process to produce new witnesses, etc. This the court denied. Defendant appealed.

H. E. Highton for appellant; Attorney General for respondent.

By the COURT.—In this cause defendant moved for a new trial on the ground, inter alia, of newly discovered evidence. We have examined the affidavits as to such newly discovered

evidence, and think that they bring the application within the rules of law and that defendant should have a new trial.

The judgment and order are reversed and the cause remanded that it may be tried anew.

PEOPLE v. BURT.

No. 10,835; April 28, 1884.

3 Pac. 653.

Appeal.—Where the Question is One of Mere Preponderance of Evidence, the judgment of the lower court will not be disturbed.

Attorney General for appellant; Nygh & Fairweather and Henry E. Highton for respondent.

By the COURT.—This is an appeal taken by the people from an order of the superior court granting the defendant a new trial, after he had been found guilty of the crime of embezzlement. The learned judge who tried the case and heard all the evidence was not satisfied with the verdict of the jury, and therefore set the same aside and granted a new trial. There was a conflict in the evidence, and we are not disposed, under the circumstances of this case, to interfere with the action of the trial court. In People v. Ashnauer, 47 Cal. 98, the court say: "It is well settled that this court will not deal with a question of the mere preponderance of evidence": See, also, People v. Gill, 45 Cal. 285.

Order affirmed.

LORENZ and Others v. JACOBS and Others.

No. 9212; April 29, 1884.

3 Pac. 654.

Pleading.—To Constitute a Cause of Action, It is Sufficient to Allege the Facts Simply, without setting out matter tending to prove them.

Pleading—Demurrer.—If Plaintiffs Have a Clear Legal Right in the subject matter of an action, and that right is being materially injured by wrongful acts complained of, the sufficiency of such a cause of action cannot be attacked by general demurrer for imperfect averment. Such errors can only be reached by a special demurrer.[1]

Waters—Enjoining Diversion.—Where One of Two or More Co-owners, in the use of water of a stream appropriated by them for beneficial purposes, diverts for use a greater quantity of water than of right belongs to him, so as to materially diminish the quantity to which the others are entitled, such parties are entitled to enjoin the wrongdoer from diverting the water to their injury.

Waters—Judgment-roll in Former Action.—Where, in an Action to determine water rights, the right of property is put in issue, the judgment-roll in a former action is admissible to prove the interest in such property of the parties bound by such judgment.

APPEAL from the Superior Court of Trinity County.

Clay W. Taylor and W. J. Tinnin for appellants; E. D. Wheeler, E. E. Williams and H. W. Phillbrook for respondents.

McKEE, J.—The assignments of error which have been argued upon this appeal are: (1) That the complaint does not contain facts sufficient to constitute a cause of action. (2) That the court erred in admitting in evidence, against defendants' objections, the record of a former judgment.

1. The complaint is not artistically drawn; yet, in its verbiage, the following facts, although defectively and illogically stated, sufficiently appear, viz.: That, in 1882, the plaintiffs were the exclusive owners, by prior appropriation, of the right

[1] **Cited** and applied in Moore v. Clear Lake Water Works, 68 Cal. 151, 8 Pac. 818, which holds that an allegation is sufficient if it shows an injury by the defendant upon the rights of the plaintiff making it.

to divert and use all the water of a stream called "Connor creek," except a sluice-head of twenty inches, or "so much as will flow without pressure through an aperture ten inches in length and two inches in height," and the surplus of the natural flow of the stream not appropriated by the plaintiffs: that "in the vicinity of Red Hill, Trinity county, state of California," the plaintiffs had constructed four ditches, which connected with and tapped the creek, by means of which they brought the water from the creek "to the mining ground in that locality," for use in mining and other useful purposes; and that, while engaged in the exercise of their right, the defendants disturbed them in its enjoyment, by wrongfully diverting so much of the water of the creek in excess of the "sluice-head" to which they are first entitled as to materially diminish the quantity which the plaintiffs are entitled to have flow through their ditches to their mining ground for mining purposes; and this wrong the defendants threaten to continue, so as to deprive the plaintiffs of their right to the use of the water of said creek; therefore, the plaintiffs ask that the defendants be adjudged to pay damages for their wrongful acts in the past and be perpetually enjoined from continuing to commit them in the future.

It is urged that the complaint is fatally defective, because it contains no distinctive averments of the date of location, size, grade, or capacity to carry water of any of the plaintiffs' ditches; and because it contains no averment that "Connor creek" or any of the ditches are in the county of Trinity. But all these are only subordinate facts tending to prove the ultimate fact of the legal right in the subject matter of the action asserted by the plaintiffs. As subordinate facts they are not essential to the statement of the cause of action. When a state of facts is relied on to constitute a cause of action, it is sufficient to allege the facts simply without setting out the facts tending to prove them. If the facts stated are sufficient to constitute a cause of action, their sufficiency cannot be successfully assailed by a general demurrer for imperfect averments of the facts. Such errors in a pleading can be reached only by special demurrer. In the presence of a general demurrer a complaint is sufficient which shows that the plaintiffs have a clear legal right in the subject mat-

ter of the action, and that the right is being materially injured by the wrongful acts complained of.

Here the injury complained of is in the improper diversion of the water of a watercourse by the defendants as co-owners with the plaintiffs in the flow of the water, and the law is well settled that where any one of two or more co-owners in the use of the water of a stream, which has been appropriated by them for a beneficial purpose, diverts for use a greater quantity of the water than of right belongs to him, so as to perceptibly reduce the volume of water flowing in the stream, and to materially diminish the quantity to which the others are entitled, in consequence of which they are damaged and their right violated, such parties are entitled to an injunction enjoining the wrongdoer from diverting the water to their injury: Story's Equity Jurisprudence, sec. 927.

2. By his answer each of the defendants asserted a right to use the water to a greater extent than the plaintiffs admitted belonged to them. The question, therefore, at issue in the case was the quantitative interest of the parties, plaintiffs and defendants, in the natural flow of the creek. Upon that question the plaintiffs gave in evidence, over the exception of the defendants, the judgment-roll in a former action, in which Henry Lorenz, one of the present plaintiffs, Nicholas Lorenz, and Jacob Liebrandt were plaintiffs, and Bartol and Henry Jacobs (two of the present defendants), and David Evans and Charles H. Bartlett (two of the present plaintiffs), were defendants, for the partition, or sale, if a partition could not be had, of one of the ditches mentioned in the complaint in this case, and "the first flow of the water of the creek known as 'Connor creek,' to the extent of one thousand inches on a grade of two inches to the rod." To that action the parties defendants appeared and answered. By his answer Henry Jacobs denied that "he was a tenant in common with the plaintiffs of the property described in the pleadings, or otherwise, or at all, or that he had or claimed any estate or interest therein." That answer raised an issue upon which evidence was taken. Upon the proof the court found for the defendant Henry; and, after finding that all the other defendants were tenants in common with the plaintiff of the property sought to be partitioned, the court, after it had ascertained and determined the extent of the interest of the respective tenants

in common, ordered a sale of the property and a distribution of the proceeds between them according to their respective interests. A sale was had, which was afterward confirmed, and final judgment was regularly entered.

The ditch property which was sold under that judgment was part of the property involved in this case. The judgment determined that all the parties in that action, except the defendant Henry, were tenants in common in the property, and that the defendant Henry was not a tenant in common, and had no interest in the property. Both these facts were directly put in issue, and were found. The finding of the last fact would have been unnecessary if the defendant Henry had filed a disclaimer, and had had the action dismissed as to him; but he did not. He took issue with the averment of the plaintiffs' complaint. That was not the formal renunciation of all claim to the subject matter in the suit, which is known in law as a disclaimer: De Uprey v. De Uprey, 27 Cal. 335, 87 Am. Dec. 81; Brooks v. Calderwood, 34 Cal. 563. Having, by his answer, raised an issue which involved trial and determination, he became bound by the decision upon the question at issue, and the record of the judgment was admissible in evidence in this case, not only for the purpose of proving the extent of the interest in the property which the plaintiffs acquired at the sale, which was confirmed by the judgment, but also for the purpose of proving that the defendant Henry had no interest in the property: Morenhout v. Higuera, 32 Cal. 294; Hancock v. Lopez, 53 Cal. 362.

There is no prejudicial error in the record.

Judgment and order affirmed.

I concur: McKinstry, J.

I concur in the judgment: Ross, J.

In re LOWENTHAL.

No. 8559; April 29, 1884.

3 Pac. 657.

Attorney—Disbarment.—Evidence Held Insufficient to justify the defendant's removal or suspension from practice at the bar as an attorney and counselor.

Proceeding for disbarment of an attorney.

The defendant, an attorney and counselor entitled to practice in all the courts of the state, was accused of being a person of immoral character and bad repute, and, as such, not entitled to practice; and further, that he was of such character at the time of his admission to practice, and that he obtained his license to practice by fraudulent concealment of such facts.

J. L. Crittenden for petitioners; W. W. Cope for defendant.

By the COURT.—This is a proceeding, under section 287 and following sections of the Code of Civil Procedure, to remove or suspend an attorney and counselor of this court. The accusation was made in due form, and, being wholly denied, a reference was made under section 298 to William Craig, Esq. Mr. Craig has filed his report, accompanied by the evidence taken by him in support of the accusation, as well as that produced by the defense. We have examined the evidence in the case, and do not find it sufficient to justify a removal or suspension of Mr. Lowenthal, and the charges are therefore dismissed.

ROYON v. GUILLEE and Others.

No. 8275; April 30, 1884.

3 Pac. 672.

Ejectment—Sufficiency of Evidence.—In an Action of Ejectment, where the plaintiff gives in evidence a judgment-roll showing a judgment in his favor and against defendants, an execution duly issued thereon, a sale of the demanded premises to plaintiff, an attachment and sheriff's return showing a levy which has never been released, and evidence of possession subsequent to the levy and prior to the judgment in the first suit, and defendants offer no evidence, a finding thereon for the plaintiff is amply supported by the evidence, and judgment must be affirmed.

APPEAL from the Superior Court of Alameda County.

Wm. M. Pierson for appellant; R. M. Swain for respondent.

By the COURT.—In this action (ejectment) the complaint is in the usual form, and the answer denies that the plaintiff was seised in fee or in any other estate or entitled to the possession of the premises; or that the defendants wrongfully withhold the possession from him, or that he was damaged in any sum whatever thereby. On the trial the plaintiff introduced in evidence the judgment-roll, showing a judgment in favor of plaintiff and against defendants Nicholas and Louise Aimee Guillee, an execution duly issued thereon, a sale of the demanded premises to plaintiff, also a writ of attachment, and the sheriff's return showing a levy thereunder on March 19, 1877, which was never released. It was then shown that subsequent to the levy of the attachment and prior to the judgment in the first suit, defendants were in possession of the demanded premises. Defendants offered no evidence. The findings which were in favor of plaintiff are attacked on the ground of insufficiency of the evidence to support them. We think they are amply supported by the evidence, and as this is the only ground relied on for a reversal of the judgment, it must be affirmed.

Judgment and order affirmed.

ELLIS v. BENNET and Others.

No. 9217; May 14, 1884.

3 Pac. 801.

Appeal—Notice.—An Appeal will be Ineffectual where the notice of appeal was not signed by the attorney of record, or of counsel for appellant, or where no proof is shown of service of the notice of appeal upon the respondent.

Appeal—Undertaking—Transcript.—An Order Appealed from cannot be Reviewed on a record which contained no copy of an undertaking on appeal, or showing that the same was filed, or that, instead thereof, a deposit in money had been made; no bill of exceptions; no showing what papers were used upon the hearing of the order to show cause upon which the order appealed from was made; and no certification of the transcript on appeal by the clerk of the court or the attorneys in the cause. The certificates of the presiding judge and clerk, made after the service and filing of the notice of motion to dismiss the appeal, will not supply the defects in the transcript.[1]

APPEAL from the Superior Court of the City and County of San Francisco.

M. G. Cobb and Horace G. Platt for appellant; Stanly, Stanly & Hayes for respondents.

McKEE, J.—This is an attempted appeal from an order made and entered May 29, 1883, restoring respondents to possession of a tract of land from which they had been dispossessed by the sheriff by the execution of a writ of possession which had been issued upon a judgment in favor of the plaintiff (who is the appellant) against one Thomas J. Currey, for the recovery of said land and costs. In the transcript which has been filed there is a copy of the notice of appeal, which is signed by attorneys, who, as appears by the recitals in the order appealed from, were not the attorneys of record or of counsel for the appellant; and it contains no proof of service of the notice upon the respondents, or either of them. Besides, it contains no copy of an undertaking on appeal, no

[1] Approved and followed in Snipsic Co. v. Riverside Music Co., 6 Cal. App. 115, 91 Pac. 747, to the effect that a transcript not certified as required by statute will not support an appeal.

showing that such an undertaking was filed at any time, or that, instead thereof, a deposit in money had been made: Code Civ. Proc., secs. 940, 941. Moreover, it contains no bill of exceptions, and no showing what papers were used on the hearing of the order to show cause upon which the order appealed from was made: Code Civ. Proc., sec. 951. Furthermore, it is not certified by the clerk of the court or the attorneys in the case, as required by section 953, Code of Civil Procedure. Upon such a record the order appealed from cannot be reviewed. The certificates of the presiding judge and clerk, made after the service and filing of notice of motion to dismiss the appeal, did not supply the defects in the transcript. The appeal in itself was ineffectual, because of the defective notice of appeal and because the transcript contains no proof of its service.

The motion to dismiss must be sustained.

We concur: Ross, J.; McKinstry, J.

PEOPLE v. BIGGINS.*

No. 10,859; May 15, 1884.

3 Pac. 853.

Information.—Where a Demurrer to an Information is Overruled, and a Plea of not Guilty is entered, the court may set aside the order overruling such demurrer, and allow counsel for the people to confess the demurrer, and file a new information, and such order will be equivalent to an allowance of the demurrer.

Information.—An Information is Sufficient, on Demurrer, Which Complies Substantially with the provisions of the statute.

Homicide—Killing After He is Helpless.—Where, by the evidence, it was shown that deceased while drunk had assaulted defendant, who thereupon knocked him down, and, while lying helpless on the ground, jumped with both feet on his face, from which act death ensued, held, that the killing was unlawful and felonious; that there were none of the elements of involuntary manslaughter in such act; and that the charge of the court to that effect was correct.

*Reversed in bank. See 65 Cal. 565, 4 Pac. 570.

Criminal Trial.—Where, at the Request of a Party, Certain Instructions are Given, he cannot thereafter complain of them.

Criminal Trial.—Instructions to a Jury Should be Given With Reference to the Imminent Facts in the case. If controverted, instructions upon them should be hypothetical, leaving the supposed facts which the evidence tends to prove to the consideration of the jury. If uncontroverted, the court may assume them.

Trial.—Where the Charge to the Jury, Considered as a Whole, Correctly States the law, and no portion of it is calculated to mislead the jury, the verdict should not be disturbed, although some part of the charge, standing alone, may contain some inaccuracy of expression which would be the subject of criticism.

APPEAL from the Superior Court of Fresno County.

W. D. Tupper for appellant; Attorney General Marshall for respondent.

McKEE, J.—On August 28, 1882, an information was filed in the superior court of Fresno county against Patrick Biggins, charging him with having committed the crime of murder. Upon demurrer it was held to be defective, and, by direction of the court, a new information was filed, to which a demurrer was interposed, which was overruled, and the defendant then entered a plea of not guilty; but upon the day fixed for trial, counsel for the people moved the court to set aside the order overruling the demurrer to the information and allow him to confess the same. The court granted the motion, and entered an order setting aside the overruling of the demurrer, and thereupon, as was recited in the order, counsel for the people confessed the demurrer, and the court directed another information to be filed. Upon the filing of the third information the defendant, after a demurrer to it had been overruled, entered two pleas—one not guilty and the other a former acquittal. Upon these he was tried and convicted of murder of the second degree.

In the course of the preliminary proceedings it was objected, and on appeal it is now objected: First, that after a plea of not guilty had been entered in the second information, upon which the case was set down for trial, it was error for the court to set aside its order overruling the demurrer, which had been filed to the information, and to allow counsel for

the people to confess the demurrer and to file a new information; secondly, after the order overruling the demurrer had been set aside, and the demurrer was confessed, the court erred in not rendering or entering judgment upon the demurrer; and, thirdly, that the court erred in overruling the demurrer to the third information.

1. The court had jurisdiction to set aside the order, and to allow counsel to confess the demurrer and to direct the filing of a new information: Code Civ. Proc., sec. 128; Pen Code, sec. 1008.

2. When the order was set aside, it would have been more formal to have entered an order allowing the demurrer: Pen. Code, sec. 1007. But the order entered, allowing the confession of the demurrer, and directing a new information to be filed, was the equivalent of an order allowing the demurrer. In legal effect the confession involved and decided the validity of the information, and left the defendant in the position of a person accused of crime, against whom no valid information had yet been filed. The proceedings, therefore, by which the information filed against him was invalidated, did not affect any substantial right of the defendant; and there was no prejudicial error in invalidating it and in directing another to be filed.

3. The information upon which the defendant was tried and convicted substantially complied with the requirements of sections 950, 951, Penal Code, and the court did not err in overruling the demurrer to it.

Next it is contended that the court erred in refusing to instruct the jury upon the subject of involuntary manslaughter. There was no refusal to instruct upon the subject of manslaughter. On the contrary, the presiding judge gave the definition of voluntary and involuntary manslaughter contained in the Penal Code, and defendant's counsel asked for no additional instruction upon the subject. But the court, in connection with its charge, told the jury that the law of involuntary manslaughter was inapplicable to the case before them, and this is complained of as error.

The case, as made out by the evidence contained in the record, was this: On the afternoon of July 30, 1882, Alexander, the deceased, and Biggins, the defendant, were drinking liquor, playing cards, and singing songs in the bar-room

of the Berenda Hotel in Fresno county. They continued at that until about 5 o'clock in the evening. At that hour "Alexander was very drunk—so drunk he could just keep from falling." Defendant had only drank about half a dozen glasses of beer. In that condition of the two men the proprietor of the hotel left them alone in the bar-room while he went to the railroad station, about eighty yards from the hotel, to put the Berenda mail-bag on board the train, which had just arrived at the station. After he left the bar-room for that purpose the two men came out on the front porch of the hotel, Alexander standing about five or six feet from the door. Suddenly he was seen to fall backward inside the door of the bar-room, his feet sticking up outside the door. In that position the defendant as suddenly jumped with both feet upon the upturned face of the fallen man, completely mashing it. "His nose was mashed flat, his eyes were mashed out, and the jaws were mashed down; his blood oozed on the floor and was spattered on the walls." A witness of the act shouted at the defendant, who immediately ran to the railroad station, where he tried to board the train; but before he succeeded in his purpose he was arrested. Alexander was immediately lifted up and carried into the bar-room, where, on being laid down upon a mattress, he died.

As to these facts there was no conflict of evidence. The record contains no other testimony given for the defendant than his own. As a witness in his own behalf he testified that he struck Alexander a blow with his right fist, which knocked him through the door of the bar-room, down upon the floor; that in giving the blow he fell with Alexander, striking his own head so violently against the floor that he remembered nothing afterward until he was arrested; that he knocked Alexander down because he had followed him out onto the porch, where, having grabbed him by the left shoulder, he, Alexander, struck him on the right shoulder and one of his arms, wounding him with a knife having a blade three inches long on which he saw blood. But it was proved that Alexander was left-handed; that he was not in the habit of carrying any weapons whatever; and that no knife was found near or on his person when he was taken up and carried into the bar-room where he died, but the next day a closed pocket-knife was taken from one of his pockets. It was also proved

that, some years before, there had been an old grudge between Alexander and the defendant, in which the latter had threatened to get even some day.

According to the testimony of the defendant himself, the case was not one of involuntary manslaughter. Assuming his testimony to be true, that he knocked down a drunken man for assaulting him, yet the facts remained uncontroverted that he did, after knocking him down, and while he lay prone and helpless, jump with both feet on his face, and that death ensued from the act. Such an act is felonious: Pen. Code, secs. 203, 204, 245. In no condition of society, civilized or uncivilized, can it be considered lawful to stamp out the life of a man under such circumstances. The act was therefore unlawful and felonious. Being such, there was in it none of the elements of involuntary manslaughter, and the charge of the court to that effect was correct: People v. King, 27 Cal. 507.

Where death ensues from an act committed under circumstances showing no considerable provocation to have existed, or an abandoned and malignant heart, or that the defendant did not intend the fatal blow to produce death, yet intended the blow, it is murder in the second degree: People v. Foren, 25 Cal. 361.

The act, in connection with the circumstances in which it was committed, made the defendant guilty of either murder of the first or second degree, or of voluntary manslaughter, or he was guiltless of any crime; and the questions arising out of the case for the determination of the jury were whether the act which resulted in the death of Alexander was the result of malice or passion, or of a necessity, real or apparent, which justified it, or whether it was committed by the defendant while unconscious of what he was doing. Upon all these questions—murder of both degrees, voluntary manslaughter, justifiable and excusable homicide, and irresponsibility in law for acts committed in mental unconsciousness—the court explained the law to the jury by instructions, given at the request of the people and the defendant, which, in their combination and entirety, were correct. Upon some of them, criticisms of more or less force have been made. But, so far as appears from the record, most, if not all, of the challenged instructions were given on the part of defendant himself;

and it is a well-settled rule that a party will not be heard to complain of instructions given at his own instance.

The main assignment of error, however, is that the court, in its charge, assumed as facts the death of Alexander; that the means adopted by the defendant caused his death; and that the manner of his death was brutal. In assuming these things as facts, it is contended that the court trenched upon the province of the jury. The alleged assumption that the manner of Alexander's death was brutal is predicated on the following instructions to the jury:

"The means adopted by the defendant which caused the death of deceased may properly be looked to in ascertaining whether the killing was malicious. If a deadly weapon was used, or means calculated to produce death, or the killing was done in a brutal and inhuman manner, and the killing not done in self-defense, or in sudden heat of passion, the jury will be at liberty to find that the slayer was actuated by malice, and the killing will be murder."

" . . . . If the jury believe from the evidence that the defendant, without receiving any considerable provocation, resented acts or words of the deceased in a brutal manner, indicating malice and an abandoned heart, defendant is guilty of murder."

Both instructions were predicated upon a supposed state of facts which the evidence tended to prove. Whether they were proved was a question of fact; and whether, if found, they established malice in the act committed by the defendant, was one of the questions which they had to decide. The instructions were therefore properly given to aid the jury in coming to a correct conclusion upon the question whether the killing was malicious.

As to the assumption that Alexander was killed, and that his death ensued from the act of the defendant, neither of these things were denied. Neither his death, nor the means causative of his death, nor the time and manner of his death, were called in question; they were therefore uncontroverted facts. Such facts may be assumed as the basis of an explanation of the law regarding them.

Instructions to a jury should be given with reference to the imminent facts in a case. These may be either controverted or uncontroverted. Whether one or the other, they consti-

tute the basis of instructions. If controverted, instructions upon them should be hypothetical, leaving the supposed facts which the evidence tends to prove to the consideration of the jury. If uncontroverted, the court may assume them; for when the evidence to a fact is positive, and not disputed or questioned, it is to be taken as an established fact, and the charge of the court should proceed on that basis. It is only where there may be doubt, that the jury are required to weigh the evidence, and it is then only that the rule applies that the court shall not charge the jury upon the weight of evidence: Wintz v. Morrison, 17 Tex. 372–387; Hughes v. Monty, 24 Iowa, 499; Harrison v. Roy, 39 Miss. 397.

There was no error in the ninth instruction.

Considered and construed as a whole, the charge stated the law of the case correctly, and the case was presented fairly to the jury. We find no portion of it calculated to mislead the jury to an erroneous conclusion; and, that being the case, their verdict should not be disturbed, even although some part of the charge, standing alone, may contain some inaccuracy of expression which would be the subject of criticism: Phillips v. Ocmulgee Mills, 55 Ga. 633; W. & W. R. Co. v. Ingraham, 77 Ill. 309.

Judgment and order affirmed.

I concur in the judgment: Ross, J.

McKINSTRY, J.—I concur in the judgment. The court below correctly charged that the law of involuntary manslaughter was inapplicable to the case. The defendant was entitled to an instruction based upon the hypothesis that his testimony was true. But if his testimony was true, his act in striking the deceased—who held in his hand a bloody knife, three inches long, with which he had stabbed defendant at least twice—was not unlawful, but was an act of necessary self-defense. Involuntary manslaughter is the unlawful killing of a human being without malice, in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act, which might produce death, in an unlawful manner, or without due caution or circumspection: Pen. Code, 192. Conceding the facts to be as stated by defendant, and the death to have been the result of a blow with

his fist, the killing was justifiable. It was done in resisting an attempt to murder or to do great bodily injury: Id. 137. It follows the court properly told the jury the law of involuntary manslaughter was not applicable to any phase of the evidence.

The court charged: "Insulting words, gestures, or actions will not reduce an unlawful killing from murder to manslaughter, unless the gestures or actions are such as to reasonably induce the belief of danger to life, or of great bodily harm, in the mind of the party against whom they are used."

This was plainly error. But inasmuch as the testimony of defendant (the only witness examined on his behalf) tended to prove, and, if credible, did prove, the killing to have been done in necessary self-defense, while the evidence on the part of the prosecution tended to prove a murder, an erroneous charge with respect to manslaughter could not have prejudiced the defendant. The killing by defendant being proved, the only other issue made by the evidence for or against him, and which the jury had to determine, was: Was the killing murderous or justifiable? Under these circumstances a verdict, guilty of manslaughter, could not have been a proper verdict, and defendant cannot complain of an instruction which may have induced the jury not to find such verdict. The court properly instructed them as to the law of self-defense.

MARTIN v. HILL and Others.

No. 7923; May 17, 1884.

3 Pac. 861.

Contract.—The Construction by the Lower Court of the Contract sued upon held erroneous, and judgment and order reversed, and cause remanded.

APPEAL from the Superior Court of Marin County.

This was an action by plaintiff to be declared owner of certain lands, and that one of the defendants, L. W. Walker, be declared to hold the same in trust for him, and that de-

fendants be compelled to execute a deed to him. Prior to the commencement of this action a suit in partition was pending between owners of undivided interests in the Rancho Laguna de San Antonio. Certain of the parties, to protect their interests, formed an association, and entered into a contract whereby they agreed that on the decree of partition the parties to such agreement might have a right to purchase from the general interest, through the association, such portions of the property as would be necessary, after such decree, to give them title to property then in their possession. The defendant L. W. Walker was an owner of an undivided interest and a party to such agreement. Martin, the plaintiff herein, had no title, and was not made a party to the partition suit, nor did he appear therein; he was a mere trespasser on the rancho, but before the decree he purchased of said Walker a parcel of undivided interest—the equivalent of the parcel here sued for—in order to protect his possession thereto. He then, with the other parties before mentioned, entered into such agreement. He now, after decree of partition, claimed a right and brought this suit to enforce a conveyance of such property to him. Defendants refused to make such conveyance, denying his right to the same on the ground that such agreement was only for the purpose of securing the parties to such partition suit, so that if, after partition, they had no title to such land, or portions thereof, as they were in possession of, they might purchase of the association sufficient to give them proper title thereto. The lower court rendered judgment for defendants on the grounds set forth by them. Plaintiffs appealed. The other facts are set forth in the opinion.

E. S. Lippitt for appellant; A. W. Thompson for respondent.

By the COURT.—The substantial point in this controversy is thus stated by appellant in his points: "Did the defendants agree with plaintiff to make title to the land in him, and have they performed their agreement? And if not, should they be compelled to do so?" The court below, in its opinion, used the following language: "To hold in the case at bar that the plaintiff may purchase from the parties to this con-

tract lands in his possession, the same being a part of the Rancho Laguna de San Antonio, is, in substance, saying that he must be allowed to take his undivided interest in the Rancho Laguna de San Antonio from the remainder of said rancho, and such is not the meaning of the contract under consideration, nor was it in any single sense the intention of the parties to such contract."

We think the principal object of the contract was to enable the parties to it to acquire title to the lands in their possession respectively, and that the court erred in its construction of the contract. That being the case, and as the defendants have not performed their agreement in that regard, and as they should be compelled to do so, plaintiff is entitled to judgment.

In our opinion, the claim that plaintiff urges against Walker is entirely outside of this case, and we see no reason why his urging such claim against Walker should deprive him of the judgment to which he would otherwise be entitled. Whatever claim he makes against Walker must depend upon some contract between Walker and himself. If, under such contract, his claim is valid, he should be allowed to enforce it. If invalid, it is not to be supposed that he can enforce it. But in no view can it be held that plaintiff, having complied with the contract counted on in this case, is not entitled to the relief which he asks, by reason of the fact that he has brought a suit against Walker, based on some other claim which he may or may not succeed in sustaining. If the relief obtained by plaintiff here is a defense to Walker, in the suit against him, Walker will have abundant opportunity for setting it up in that case.

Judgment and order reversed and cause remanded, with instructions to render judgment for plaintiff in accordance with the prayer of his complaint.

PEOPLE ex rel. BUCKNER v. VEUVE.

No. 9124; May 17, 1884.

3 Pac. 862.

Courts.—There is No Such Office as "Police Justice of the city of San Jose," and therefore such office cannot be usurped, intruded into, or unlawfully held or exercised.

Courts.—The Exercise by a Justice of the Peace of Jurisdiction Outside of that conferred by the constitution is not the exercise of an office, and the result thereof would be to render acts done outside of such jurisdiction void.

APPEAL from the Superior Court of Santa Clara County.

This was a proceeding against the defendant for usurpation of the office of "police justice of the city of San Jose." The defendant answered that there was no such office existing, and that the jurisdiction which he exercised was that conferred on a justice of the peace, which office he held, and which included the powers of a police judge; and the trial court so found. Plaintiff appealed.

Attorney General Marshall and W. B. Hardy for appellant; D. W. Harrington for respondent.

By the COURT.—There is no such office as "police justice of the city of San Jose"; therefore, the defendant could not have usurped, intruded into, or unlawfully held or exercised that office. Conceding the act to be unconstitutional which in terms confers jurisdiction on justices of the peace in cities of more than ten thousand inhabitants which other justices of the peace do not possess, the exercise of such additional jurisdiction would not be the exercise of an office, but the exercise of jurisdiction outside of the office of justice of the peace; the result of which would be to render acts done outside of such jurisdiction void.

Judgment affirmed.

In re Estate of FEELEY, Deceased.

No. 7953; May 20, 1884.

3 Pac. 876.

Executor's Account—Proceedings to Settle.—Evidence held insufficient to justify the decision and findings.

APPEAL from the Superior Court of Santa Cruz County.

This was a proceeding for the settlement of the account of the executor of this estate. Objections were filed to said account, and thereafter the court duly settled such account. From such settlement, and the orders and findings thereon, the executor appeals.

W. D. Story and Moore, Laine & Johnston for appellant; Z. N. Goldsay and J. A. Barham for respondent.

By the COURT.—Appellant urges that the court found, against the evidence, that the executor was to be charged with seventeen and three-quarters acres of land, "a little more or less"; that the court finds, and "there is no dispute," that Pagels bought the two-acre piece; that one acre was washed away without the fault of the executor; and that "there was no dispute" but the railroad purchased four and one-half acres. But the court found that Pagels bought the one-acre tract, "a little more or less," and the executor swore: "I received one hundred and eighty dollars from Pagels for the one acre, sold by order of the court." Take from the twenty-three acres, of which deceased was seised at his death, the one acre sold to Pagels, the one acre washed away, and the four and one-quarter acres sold to the railroad company, and there would remain sixteen and three-quarters acres. The specification of insufficiency of evidence in the statement, on motion for a new trial, is to the effect that the executor should not be charged with a greater quantity of land than sixteen and three-quarters acres; and the statement for new trial avers that there was evidence "showing" that there was left "in the hands of the executor" sixteen and three-quarters acres. It would seem, therefore, that the court should have

found sixteen and three-quarters instead of seventeen and one-half acres as being all the land remaining in possession of the executor. But while the court found that of the twenty-acre tract one acre had been washed away and four and one-half acres had been sold to the railroad in 1874—leaving of that tract fourteen and one-half acres—it charged the executor with the rental value of seventeen and three-quarters acres of the twenty-acre tract from June, 1871, and also charged him with the value of the use of the two-acre tract for a portion of the same time.

There is no finding as to the one hundred and seventy dollars alleged to have been stolen from the executor, nor as to the item of about twenty-five dollars contested.

The interests of justice demand a new trial of the issue. Order reversed and new trial granted.

PEOPLE v. ELSTER.

No. 10,933; May 27, 1884.

3 Pac. 884.

Criminal Law—Evidence.—The Conduct, Acts and Statements of a person under arrest for a crime which he is charged with having committed are admissible in evidence, and such inference may be drawn from them as are warranted by the evidence; but an inference of guilt cannot be drawn from a statement evincive of innocence, nor from silence, where a person is not bound to speak, nor from refusal to answer unauthorized questions touching the charge against him.[1]

Larceny—Possession of Stolen Goods.—When a Man in Whose Possession stolen property is found gives an account of how he came by it, as by telling the name of the person from whom he received it, it is incumbent on the prosecution to show that the account is false, unless the account given be unreasonable or improbable on the face of it.

Larceny—Possession of Stolen Goods.—While It Would be Proper, in a case in which there is any evidence tending to prove

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[1] **Cited** and explained in People v. Dole, 122 Cal. 490, 68 Am. St. Rep. 50, 55 Pac. 583, holding that evidence of conduct, etc., is competent, but it is for the jury to draw the inference therefrom.

Cited and approved in People v. Dole, 122 Cal. 498, 68 Am. St. Rep. 50, 55 Pac. 586, in respect of silence being no evidence of guilt.

inculpatory facts and circumstances in connection with the possession of property recently stolen, for a court to instruct the jury that they will be justified in finding the defendant guilty of the theft, it would be improper and erroneous to give such instructions if there were no evidence in the case to warrant the inference of such circumstances.

APPEAL from the Superior Court of Stanislaus County.

Wright & Hazen for appellant; Attorney General for respondent.

McKEE, J.—In this case the defendant was convicted of grand larceny. He moved for a new trial. The motion was denied, and from the judgment of conviction and the order denying a new trial he has appealed.

The larceny is charged to have been committed on Sunday, April 1, 1883. It consisted of the stealing of a calf from the custody of its alleged owner. The principal evidence connecting the defendant with the offense was the discovery of the hide of the calf in the shop of a butcher, to whom the defendant had fetched and sold it early on the morning of April 2, 1883. At the trial the defendant attempted to account for the possession, but it was contended the account was false. The question, therefore, of the guilt or innocence of the defendant depended upon the possession by him of the property soon after it was alleged to have been stolen, and the circumstances in connection with its possession and sale. Assuming that the calf belonged to the person named in the information as the owner, and that it had been stolen from him, yet the mere possession of recently stolen property, standing alone, and unconnected with other facts and circumstances tending to prove guilt, is not of itself sufficient in law to warrant a conviction; it is merely a circumstance tending to implicate the accused; but if linked with other facts and circumstances also tending to implicate him, it may amount to direct and positive proof: People v. Beaver, 49 Cal. 57; People v. Getty, 49 Cal. 581; People v. Chambers, 18 Cal. 388; People v. Ah Ki, 20 Cal. 177; People v. Gassaway, 23 Cal. 51; People v. De Lacey, 28 Cal. 590; People v. Noregea, 48 Cal. 123. To that extent the court properly explained the law to the jury; but in connection with that explanation it instructed them as follows: "If you believe from the evi-

dence, beyond a reasonable doubt, that the defendant refused to give any explanation of the fact of possession, or attempted to dispose of the property, or to destroy its marks, these facts, if you find them to exist, or any other circumstances naturally calculated to awaken suspicion against him, and to corroborate the inference of guilty possession, will, in connection with the fact of recent possession, justify you in finding the defendant guilty."

This instruction was followed by others to the effect that if the jury believed that the calf was stolen, and was very soon afterward found in the defendant's possession, the fact "that the defendant failed or refused, when asked, to account for the possession in an honest manner, or to show that such possession was honestly obtained," or "refused or neglected to give any explanation of his possession, was a circumstance which, in connection with the fact of his possession, and in connection with any other facts or circumstances which would be calculated to awaken suspicion against him and to corroborate the inference of guilty possession, would justify them in finding the defendant guilty."

The only evidence in the record for the assumption of the fact that the defendant, when asked, failed, or refused, or neglected to give any explanation of his possession of the property, is this: After the defendant had been arrested, and was in the custody of the officers who arrested him, on the way to the examining magistrate, he inquired of the officer if he was arrested for an animal which had been sold to Tranor (the butcher at whose shop the hide of the calf had been found), admitting that he had sold some beef there; and then the officer said to him, "You have got no cattle of your own, have you?" To which he replied, "He had not." "I then," continued the officer, testifying, "asked him where he got the cattle or beef which he sold? He said he did not understand the law, and he did not think it was best for him to say anything about it; that the less he talked about it the best, as long as he didn't understand the law. I told him the first thing I would do if I was charged with having in my possession property that there was a question about the title, would be to tell where I got it. He said he did not understand the law, and did not propose to say much about it; didn't understand anything about the law. He said that beef

that was sold to Tranor was straight—nothing wrong about it."

It is well settled that the conduct, acts and statements of a person under arrest for a crime, which he is charged with having committed, are admissible in evidence against him, and such inferences may be drawn from them as are warranted by the evidence, considered in the light of human experience. But an inference of guilt cannot be drawn from a statement evincive of innocence, nor from silence, where a person is not bound to speak, nor from refusal to answer unauthorized questions touching the charge against him, which, under the circumstances, called for no reply: Code Civ. Proc., secs. 1958, 1960. A person accused of crime is under the protection of the law. He is not bound to assert his innocence to an officer who arrests him, nor to answer questions asked by the officer as to the crime for which he is arrested, or any circumstances connected with it. Under such circumstances the accused has the right to be silent, or to assign the reason why he, at that time, declines to enter into explanations. If he keeps silence or refuses to answer "because he does not understand the law, and had better not say anything," no inference from his silence or refusal can be drawn against him: 1 Greenleaf on Evidence, secs. 197, 199; Commonwealth v. McDermott, 123 Mass. 440, 25 Am. Rep. 120; Gale v. Lincoln, 11 Vt. 152.

Now, neither statement made by the defendant that "the sale by him of the beef to Tranor was all straight, and there was nothing wrong about it," nor his refusal to answer the questions which were asked by the officer, warranted the inference of an implied admission of guilt. As the statement was in itself evincive of innocence and not of guilt, and the refusal was the exercise of a legal right, it was erroneous for the court to assume them as circumstances upon which to predicate instructions that the possession of the defendant was a "guilty possession." If such an inference could be drawn at all from the conduct or statements of the defendant, it was for the jury to draw it; they only could determine whether the conduct of the defendant, on the occasion of his arrest, was contrary to the ordinary behavior of a person charged with crime, or attributable to his mental characteristics, or evinced guilt or innocence: Greenfield v. People, 85 N. Y. 86, 39 Am. Rep. 636. It was not for the court: People v. Ah Sing, 59 Cal. 400.

Of many of the other circumstances upon which the instructions were predicated we find no evidence in the record. The record discloses that the defendant did not fail or refuse to explain or account for his possession of the property. At the trial of the case direct evidence was given tending to prove that the calf belonged to one Fagan, a farmer and cattle owner; that Fagan killed it the Sunday evening when it was charged to have been stolen, on a range where his cattle pastured, in common with cattle belonging to the person named in the information as the owner, and others; that, after killing it, he, with his son, took out the entrails of the calf at the place on the range where it was killed, cut off its head and feet, as was customary in killing an animal for market, and took it, with the assistance of the defendant, who was his hired man, to his farm-house, where he kept it through the night, and sent it next morning, by the defendant, for sale to the butcher; that it was sent by the defendant, for that purpose, early in the morning, because the butcher had requested that any animal sent for sale should be sent early in the morning, before he went to supply his customers. The defendant himself also testified, as a witness in his own behalf, that his connection with the possession of the calf was only that of a hired man, acting under the orders of Fagan, who claimed to be the owner of the calf, and who, he believed, was the owner. Now, this account was either true or false. If true, the possession by the defendant was not a "guilty possession," whether the calf belonged to the person named in the information or to Fagan. No presumption of guilt could arise against the defendant from a mere possession of property received from his master for the purpose of selling it, nor could an inference of guilt be drawn against him, unless the account given of the possession was unreasonable or improbable on its face. If neither unreasonable nor improbable, then the possession was accounted for. It was not a guilty possession unless it was proved, or it might be fairly presumed, that the account or explanation given of it was false. "It is a general principle," says Mr. Justice Alderson, "that when a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, it is incumbent on the prosecution to show that the account is false,

unless the account given be unreasonable or improbable on the face of it'': Roscoe on Criminal Evidence, 21.

After the defendant had accounted for the possession, it was for the jury to determine whether the account given was reasonable or improbable, true or false. But, whether the account was one or the other, it did not warrant the assumption upon which to predicate instructions to the jury that the defendant had failed or refused or neglected to account for the possession at all. Neither of these things could be assumed of the conduct or statement or explanation of the defendant, as given in evidence; and it is well settled that facts and circumstances upon which instructions are predicated must be founded upon the evidence in the case. If there be no evidence tending to prove them, it is error for the court to assume them, or to so word instructions with reference to them as to leave it to the jury to infer their existence. While, therefore, it would be proper, in a case in which there is any evidence tending to prove inculpatory facts and circumstances in connection with the possession of property recently stolen, for a court to instruct the jury that they will be justified in finding the defendant guilty of the theft, it would be improper and erroneous to give such instructions if there were no evidence in the case to warrant the inference of such circumstances. Instructions should only be given with reference to a fact or state of facts in evidence; otherwise they are mere legal abstractions, inapplicable to the case, and calculated to mislead the jury (People v. Turley, 50 Cal. 469; People v. Vasquez, 49 Cal. 562; People v. Sanchez, 24 Cal. 17; People v. Best, 39 Cal. 690); and, in giving them, comments on the testimony produced should not be made; nor should they contain expressions upon the weight and sufficiency of the evidence; nor strong expressions as to the guilt of the accused. Such expressions, coming with the weight of authority, are calculated to bias the minds of the jurymen, and may impair the right of the accused, guaranteed by the constitution, to a trial of the issues of fact by an impartial jury: People v. Williams, 17 Cal. 142; People v. Ah Sing, 59 Cal. 400; People v. Mitchell, 55 Cal. 236; People v. Levison, 16 Cal. 99, 76 Am. Dec. 505; People v. Walden, 51 Cal. 588; People v. Wong Ah Ngow, 54 Cal. 152, 35 Am. Rep. 69; People v. Carrillo, 54 Cal.

63; People v. Feilen, 58 Cal. 218, 41 Am. Rep. 258; People v. Graham, 21 Cal. 262; People v. Atherton, 51 Cal. 495.

Fagan, a witness called by the defendant, was examined, and gave material evidence in the case. On his cross-examination the district attorney asked the following questions, viz.: "Have you ever been arrested for a felony? Have you been arrested for stage-robbing? Have you been arrested for cattle-stealing?" The witness was compelled to answer each question, against the exception of the defendant. The only possible object of asking the questions was to impeach the credibility of the witness. But the testimony was not admissible for that purpose. The mere fact that the witness had been arrested does not prove nor tend to prove that he had been convicted of any offense; and until there is proof of conviction, the witness was protected by the legal presumption of innocence. Hence the rule formulated by section 205, Code of Civil Procedure: "A witness may be impeached by the party against whom he was called, by contradictory evidence that his general reputation for truth, honesty, and integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony": People v. Chin Mook Sow, 51 Cal. 597; People v. Reinhart, 39 Cal. 449; People v. McDonald, 39 Cal. 697; People v. Snellie, July term, 1871 [not reported].

It follows that the foregoing rulings and instructions of the court were erroneous.

Judgment and order reversed and cause remanded.

We concur in the judgment: McKinstry, J.; Ross, J.

SOUTHMAYD v. BERRY.

No. 7267; May 27, 1884.

3 Pac. 893.

Appeal.—Findings Held Inconsistent With Each Other, and with the averments in the complaint, and judgment reversed.

APPEAL from the Superior Court of Humboldt County.

W. H. Brumfield for appellants; Hanna & Steck for respondent.

By the COURT.—The findings in this case are indefinite, and are inconsistent with each other and with the averments of the complaint.

Judgment reversed and cause remanded, with leave to the plaintiff to amend her complaint if she shall be so advised.

BROWN v. SUPERIOR COURT.

No. 8011; May 27, 1884.

3 Pac. 895.

Certiorari.—Where a Court has Jurisdiction of the subject matter, and of the parties to an action, an order, though erroneous, if not in excess of jurisdiction, cannot be reviewed on certiorari.

Application for writ of certiorari.

Jas. A. Shankland for petitioner.

By the COURT.—The superior court having jurisdiction of the estate of the insolvent, Baeher, and of all persons interested in it, it is clear that the order of that court directing the assignee to pay out of the estate certain sums of money, if erroneous, was not in excess of its jurisdiction.

Writ denied and proceedings dismissed.

ALEMANY, Archbishop, v. ORTEGA.

No. 9494; May 29, 1884.

4 Pac. 13.

Forcible Entry.—Findings Held sustained by the evidence.

APPEAL from the Superior Court of Santa Barbara County.

J. F. Richards for appellant; R. B. Canfield for respondent.

By the COURT.—This is an action for an alleged forcible entry upon lands alleged to have then been in the actual occupancy of the plaintiff. We think the evidence fails to show that there was any forcible entry on the part of the defendant or that the land in question was in the possession of the plaintiff. But that, on the contrary, it shows that the land was in the possession of Francisco Mora, bishop of Monterey, and lessor of the defendant at the time of the latter's entry.

Judgment and order affirmed.

TALMADGE v. STRETCH.

No. 8699; May 29, 1884.

4 Pac. 15.

Promissory Note—Parol Evidence.—Where a Receipt and a Note are executed contemporaneously, the receipt is admissible in an action on the note, where there is evidence to show that both were part of one transaction; and oral testimony is admissible to apply the receipt to the note and to prove that it was the only consideration for the note.

Promissory Note—Consideration.—Money Advanced by the Plaintiff to the defendant on account of the latter's share of the capital in a business, which sum he was to invest and contribute to the business, is sufficient consideration to support a note given to secure such sum, and plaintiff may recover on such note, though the plaintiff and defendant were partners at the time of giving such note.

APPEAL from the Superior Court of San Joaquin County.

J. B. Hall for appellant; Byers & Elliot for respondent.

By the COURT.—1. There was a substantial conflict in the evidence with reference to the truth or falsehood of the matter set up in defendant's answer.

2. The receipt was admissible, as there was evidence tending to prove that it was executed and delivered contemporaneously with the note; that both papers were parts of one contract or transaction.

3. The oral testimony was admissible to apply the receipt to the note, to prove that it was given in return and as the only consideration for the note.

4. The plaintiff requested the court to instruct the jury: "If the jury find from the evidence that the note was given to secure to the plaintiff money which plaintiff had advanced for defendant, on account of the defendant's share of the capital, which he was to contribute and invest in the business, then the note is supported by a sufficient consideration, and the plaintiff is entitled to recover, although the plaintiff and the defendant were partners at the time of the giving of the note."

Appellant assigns as error the refusal of the court below to give the foregoing instruction.

It is said by respondent there was no evidence upon which to base the instruction. But the plaintiff testified: "I kept a memorandum of all my expenses, whether of labor done, materials furnished, or money advanced by myself. . . . . Well, Mr. Stretch and me looked over the account, from time to time, that was with us, counted everything, and I asked him for his part or his note. He had disappointed me in furnishing his portion. The note was given on the settlement of the first kiln of bricks in which we was partners. We first talked of three hundred and fifty dollars, but I had the hauling, and I told him I had to pay out considerable, and finally I said I thought three hundred and seventy-five dollars would be about right, and he agreed to give it to me, and he said he thought he would be able to pay it in a short time; and finally he came out in the field one day where I was heading and said he would like to turn so much where he was owing,

and asked me to give him an order, and he gave me a note, and I gave him what I supposed to be an order; he called it an order, and I supposed it was. I did not read either paper; he read them both over."

The testimony of plaintiff, if credible, tended to prove that the promissory note was given in consideration of money advanced by plaintiff for defendant toward the latter's share of the capital by him to be contributed. The instruction should therefore have been given.

Judgment and order reversed and cause remanded for a new trial.

NELSON v. FLOYD.

FRASER v. NELSON and Another.

No. 7644; June 13, 1884.

4 Pac. 105.

Appeal.—An Order Granting a New Trial, Where the Evidence was substantially conflicting, will not be disturbed on appeal.

APPEAL from the Superior Court of Lake County.

Cape & Boyd and T. A. O'Brien for appellant; John S. Bugbee for respondent.

By the COURT.—Appeals from an order granting a new trial. The decision and judgment, which the court set aside, were founded upon substantially conflicting evidence, bearing upon the main questions, as issue between the parties, as to the existence and extent of the subordinate claims and liens against the building in controversy; and as the court set the judgment aside and granted a new trial upon the ground that the evidence was insufficient to justify them, this court, in the absence of a manifest abuse of discretion, will not disturb the order: Guttierrez v. Brinkerhoff, 9 Pac. C. L. J. 734; Blum v. Sunol, 63 Cal. 341, 11 Pac. C. L. J. 275; Pierce v. Schaden, 55 Cal. 406; Bronner v. Wetzlar, 55 Cal. 419.

Order affirmed.

GRINDLEY v. SANTA CRUZ COUNTY.

No. 8170; June 18, 1884.

4 Pac. 390.

County Supervisors—Contract With Physician—Discharge.—In an action by a physician to recover damages for breach of contract made with him by the supervisors of a county, held, that defendant was not, on the facts recited in opinion, justified in discharging plaintiff previous to the expiration of the time for which he had been employed to perform the service.[1]

APPEAL from the Superior Court of Santa Cruz County.

F. I. McCann for appellant; W. D. Storey and Z. N. Goldsby for respondent.

THORNTON, J.—Action by a physician to recover damages for breach of contract made with him by the supervisors of Santa Cruz county.

The court rendered the following decision:

"(1) That on the sixth day of October, 1879, the defendant employed plaintiff as county physician for the period of one year thereafter from that date, and to pay him therefor monthly the sum of thirty-seven dollars.

"(2) That, at the time of said contract, the plaintiff was a regularly graduated physician and surgeon, holding a diploma, authorizing him to practice medicine and surgery, from the Jefferson Medical College, of the state of Pennsylvania, dated on the 15th of March, A. D. 1865.

"(3) That, at the time of said contract, the plaintiff held a certificate from the Medical Society of the State of California, showing his right and authorizing him to practice medicine and surgery in any part of this state.

"(4) That the board of supervisors of the defendant, at the time of entering into the contract, personally handled and examined both the diploma of the plaintiff and his certificate to practice medicine and surgery in this state.

[1] Cited and approved in People v. Wheeler, 136 Cal. 654, 69 Pac. 436, holding that a county physician's term of office cannot be abridged through removal by the board of supervisors.

"(5) Plaintiff, on the third day of January, A. D. 1879, filed with the recorder of said county, and caused to be recorded, his said certificate to practice medicine and surgery in this state.

"(6) Under the contract aforesaid, the plaintiff on the same day, the 6th of October, 1879, entered upon the performance of his duties, and attended to all the indigent sick persons of said county, and attended daily at the hospital of said county, between the hours of 9 o'clock and 11 o'clock A. M. of each day, up to the eighteenth day of January, 1880, when, and on which day, the steward of the said hospital, by order of the board of supervisors of defendant, prevented the plaintiff from visiting the sick wards of said hospital, or from attending upon the indigent sick persons of said county.

"(7) On the eighteenth day of January, A. D. 1880, the defendant prevented the plaintiff from completing or from further continuing the contract, or performing his part to be performed under it.

"(8) The duties of the plaintiff under the said contract consisted in visiting the indigent sick of said county, and prescribing such treatment, medicines, and attention as might be necessary.

"(9) It was the practice of plaintiff to go to the office of the said hospital in the forenoon of each day, generally about 10 o'clock, and attend to such patients as applied to him at said office for treatment, and that he did not go into the wards of said hospital, or seek the patients, to ascertain if they needed treatment; that some of said patients were confined to their wards, and were unable to go to said office; that this mode of treatment was not a compliance with the duties of said plaintiff as county physician.

"(10) No rules or regulations have ever been made by defendant's board of supervisors for the hospital or jail of said county, or for the guidance or direction of plaintiff.

"(11) The plaintiff, at the time of entering into the contract, was engaged in the practice of medicine and surgery in the said county of Santa Cruz, and the performance of the contract with defendant subjected him to no additional expense.

"(12) Very soon after the entry by plaintiff upon the discharge of his said duties, a contest arose between himself

and said steward in regard to their respective powers and duties—the plaintiff claiming general authority over said hospital, and the regulation and supervision of the conduct, diet, and exercise of the patients, and that in all respects he had assumed full and exclusive management of the said hospital; that the board of supervisors of said county, after an investigation of the said matters, did, on the seventeenth day of January, 1880, by an order on the minutes of said board, discharge the plaintiff from further attendance upon the indigent sick persons of said county, residents therein, and remove him from said position of county physician.

"(13) That the plaintiff, on the thirty-first day of January, 1880, made out, in writing, a claim against the defendant for his services under said contract, in the usual form of accounts against said county, stating therein the items of his claim, and made oath thereto before the clerk of said county that the same was correct, and that no part thereof had been paid or allowed; that the amount named in said account was fully done; and that the same had not been theretofore presented to or rejected by said board; which oath was subscribed by plaintiff and certified by said clerk, in writing, upon said account, and delivered the said account so verified to the clerk of said board of supervisors, and the same was filed and presented to said board, and by it considered and disallowed on the third day of February, 1880.

"(14) No opportunity has, up to this time, been presented to plaintiff to engage in the same kind of service, or duties to be performed by him under said contract.

"(15) Plaintiff has been, since his discharge, ready and willing to continue and complete the duties on his part to be performed under said contract, and is still ready and willing to complete the same.

"(16) On the third day of February, 1880, the board of supervisors of defendant, by an order regularly made upon their minutes, appointed another and different person to the duties, for the unexpired term of one year, to wit, until the sixth day of October, 1881, which the plaintiff had contracted to perform, and was, as aforesaid, prevented from performing.

"(17) The amount of money to which plaintiff would be entitled on the completion of his contract, and yet unpaid to him, is the sum of three hundred and thirty-three ($333) dollars.

"(18) The amount of damage suffered, and necessarily to be suffered, by plaintiff, by reason of the action of the defendant in preventing the completion of said contract, is the sum of three hundred and thirty-three dollars."

CONCLUSIONS OF LAW.

"That the interests of the indigent sick of said county in said hospital demanded the removal of said plaintiff from the position of physician of said hospital, and that the board of supervisors of said county, in the removal of said plaintiff from said position, was in the exercise of a lawful authority of said board, exercised in a lawful manner. Let judgment be entered for defendant for its costs in this action."

The contract of plaintiff and defendant was a valid contract. If plaintiff performed the duties required of him by the contract, and incumbent upon him as physician of the hospital, the defendant had no right to discharge him during the period embraced in it. The findings in relation to the plaintiff's performance are not clear. It is not distinctly found that he did not perform such duties. The sixth finding states that he did perform them. The finding (ninth) that he did not go into the wards of the hospital, seek the patients there confined, who were unable to go to the office, where it was his practice to meet them and prescribe for them, is not clearly inconsistent with the finding that he did perform the duties required of him, for it does not appear by the facts found that his attendance on them in the wards was necessary. It may have been that it was not necessary. Though these patients were confined to the wards, it might not have been requisite that he should have gone there. They may not have required his attendance at all; and this might have been well known to the plaintiff. These findings, however, are not clear and definite.

For what reason the defendant discharged the plaintiff does not appear. We cannot perceive, as a matter of law, that the controversy between plaintiff and the steward of the hospital justified the board of supervisors in discharging him. The plaintiff may have been in the right in this matter. Nothing is found from which we can infer in law that the claim made by plaintiff was not just and proper. The facts should have been found from which the court might be able to draw the legal conclusion that plaintiff was in the wrong

and was acting outside of the line of his duty. It does not appear from the finding (twelfth) that plaintiff did anything beyond making a claim as to the extent of his powers. This may have arisen from an honest error of judgment on his part. It does not appear that he performed any act beyond what he was authorized as physician of the hospital, or that he exceeded his authority in any way. This controversy, we think, might have been adjusted by the board of supervisors, and the scope, extent and limits of the authority of the contending officers defined by the board. The claim of authority by the plaintiff might have been honestly made, and we cannot see how such claim, honestly made, should have subjected him to be discharged by the board from its employment under the contract, and prevented by it from the performance of its requirements. No sufficient reason is given for such discharge and prevention in the findings or conclusions of law. The general reasons given for such discharge or removal, in the conclusions of law, are not sufficient. The ground on which such discharge, removal and prevention was made should have been especially found, so that the court could perceive, as a matter of law, that such action of the board was justified by law. It must be remembered that the plaintiff was in the discharge of his duties under a lawful contract for a specific period, and as long as he complied with his contract and with the law governing his relations to the county as its employee and contractee, the board had no authority to discharge or remove him from his position, or prevent him from performing the duties incumbent on him.

According to the eighteenth finding, the plaintiff had suffered damage by reason of the action of defendant in the sum of three hundred and thirty-three dollars; yet the judgment is for defendant, and costs are adjudged to it. This is a non sequitur. We cannot see that such a judgment can be rendered while this finding stands.

We find no other error in the record injurious to the plaintiff.

The judgment must be reversed, and, owing to the ambiguity and indefiniteness of the findings, the cause will be remanded for a new trial, to be had in accordance with the views herein expressed.

We concur: Sharpstein, J.; Myrick, J.

THATCHER v. EDSALL.

No. 7792; June 28, 1884.

4 Pac. 202.

Mortgage—Fraud in Execution.—Where, in an Action of Foreclosure of mortgage, a cross-complaint is filed, charging plaintiff and others with fraud and conspiracy regarding the execution of the mortgage, and the lower court finds against the defendant as to such fraud, the plaintiff is entitled to his judgment of foreclosure, however fraudulent the conduct of the other parties (joined in such cross-complaint) may be.

APPEAL from Superior Court of Mendocino County.

Porter & Rutledge for appellant; T. L. Carothers and T. B. Bond for respondent.

ROSS, J.—To a verified complaint, in the ordinary form, for the foreclosure of two certain mortgages, the defendant, Juana B. Edsall, interposed an answer in which she admitted the execution of the notes and mortgages set forth in the complaint but denied that at the time of such execution she was indebted to the plaintiff in any sum of money, and alleged that she executed the notes and mortgages without receiving any consideration whatever therefor, and that each of those instruments was procured from her by false and fraudulent representations. For a further and separate answer she alleged that she did not know, at the time of her execution of the note and mortgage set forth in the first count of the complaint, that the amount thereby agreed to be paid by her was $4,700, but believed that the sum therein mentioned and agreed to be paid was $4,500, and no more, and that the sum of $4,700 was inserted in said note and mortgage without her knowledge or consent. Like averments are made in the answer of defendant with respect to the note and mortgage secondly counted on by the plaintiff; that is to say, it is alleged that defendant did not know at the time of the execution of that note and mortgage, or for a long time afterward, that the sum therein mentioned and agreed to be paid by her was $5,300, but that she believed the sum to be $4,500, and no more, and that the sum of $5,300 was inserted in said note and mortgage without her knowledge or consent. In addition

to her answer, the defendant filed, with the permission of the court below, a cross-complaint, in which she made the plaintiff Thatcher and one Knox and one Harrison parties defendant, and therein charged that Thatcher, Knox and Harrison entered into a conspiracy to cheat and defraud her of all her property, including that described in Thatcher's mortgages, and that those mortgages were procured from her by the alleged conspirators by means of false and fraudulent representations, made in the furtherance of the conspiracy, to the end that they might obtain from her, among other property, the land embraced in the mortgages.

It is entirely clear that but for the averments implicating Thatcher in the alleged conspiracy, the cross-complaint would have had no place in the action, which, as has been stated, was simply one for the foreclosure of the mortgages executed to Thatcher. And when the court below, after trial, found, as it did, the facts to be that the defendant executed the notes and mortgages in question in consideration of the amount of money named in them being loaned to her by the plaintiff at the time of their execution, and that she executed the instruments with full knowledge of their contents, and without any false or fraudulent representations, and that Thatcher never did conspire with Knox and Harrison, or either of them, or with anyone else, or at all, to cheat or defraud the defendant, it would seem to follow that Thatcher is entitled to the decree awarded him by the court below, foreclosing the mortgages set out in his complaint, unless, indeed, we can hold as unsupported by the evidence the findings of fact made by the trial court. This, after an attentive reading of the evidence, we are unable to do, under the established rule governing this court in such matters. However fraudulent toward defendant the conduct of Knox and Harrison, if, as the court below found, Thatcher had no part with them, and was himself guiltless of any false and fraudulent representations, but loaned defendant the money for which she executed the notes and mortgages, we see no reason why he is not entitled to a decree of foreclosure, the event having occurred conferring upon him the right to foreclosure.

Judgment and order affirmed.

I concur: McKinstry, J.

I concur in the judgment: McKee, J.

HUGHES v. MENDOCINO COUNTY.

No. 8155; June 28, 1884.

4 Pac. 236.

Res Adjudicata—Judgment on Claim Rejected by Board of Supervisors.—Each claim presented to and rejected by a board of supervisors constitutes a distinct and separate cause of action, and a judgment obtained on one will constitute no bar to an action for the recovery of the others.

APPEAL from the Superior Court of Mendocino County.

This was an action against the defendant county for personal services rendered, for which plaintiff presented to the board of supervisors his several claims, which claims were rejected. Defendant in the answer denied the validity of a portion of the claims, and set up the fact the plaintiff had already recovered one judgment against the defendant for a portion of such claims and that the action on the rest of such claims is therefore barred.

Archibald Yell for appellant; Thomas B. Bond for respondent.

By the COURT.—Unless the plaintiff's action was barred by the former judgment, the defendant was not materially prejudiced by any of the alleged errors, and the judgment should not be reversed for any error which does not affect the substantial rights of the parties. In our opinion, the former judgment, which it is claimed constitutes a bar to this action, cannot be held to have that effect.

We think each claim presented to and rejected by the board of supervisors constituted a distinct and separate cause of action, and that a judgment obtained on one would constitute no bar to an action for the recovery of the others.

Judgment and order affirmed.

Estate of CROZIER, Deceased.

No. 9145; June 30, 1884.

4 Pac. 240.

Costs—Amendment of Judgment.—No Error Appearing from the transcript on appeal, the order amending judgment as to costs is affirmed.

APPEAL from the Superior Court of San Joaquin County.

Louttit & Lindley and J. S. Terry for appellant; Byers & Elliott, Campbell & Muenter and W. L. Dudley for respondent.

See Estate of Crozier, 65 Cal. 332, 4 Pac. 109.

By the COURT.—The court entered judgment May 29, 1883. On the 13th of June, 1883, the court made an order amending the judgment as to costs, directing the same to be paid in due course of administration: Code Civ. Proc., sec. 1332. It does not appear that any error was committed. For aught that appears in the transcript, due notice of motion to amend was given and hearing had thereon.

Order affirmed.

REYNOLDS v. SCOTT.

No. 9480; July 18, 1884.

4 Pac. 346.

New Trial—Granting on Condition.—A new trial may be granted conditionally upon failure of one of the parties to perform certain conditions, as the payment of costs and expenses.[1]

New Trial.—Where the Evidence is Conflicting, the Order Granting a new trial will not be disturbed.

APPEAL from the Superior Court of Los Angeles County.

This was an action for the recovery of certain goods. Judgment was rendered for plaintiff. Defendant moved for a

[1] **Cited** in Ramaisch v. Kirshbraun, 107 Cal. 661, 40 Pac. 1045, as to whether a bill of lading takes the aspect of a delivery of the goods.

new trial, which was granted on condition that plaintiff failed to comply with the order of court; awarding to defendant costs and expenses of suit. The other facts appear in the opinion.

Smith & Hupp for appellant; P. W. Dorner for respondent.

SHARPSTEIN, J.—The fact of the court having made the order granting a new trial dependent on the plaintiffs' failing to do certain things, is, in our judgment, an immaterial circumstance. It is not claimed that the plaintiffs did that which, according to the terms of the order, would have defeated it. If we can discover any ground on which the court would be justified in granting a new trial, the order must be affirmed. There was evidence which tended to prove that the goods, which this action was brought to recover the possession of, were shipped at Cincinnati by the defendants Scott & Co., consigned to themselves at Los Angeles, and that the bill of lading was delivered by them to the defendants S. Kuhn & Sons, who forwarded it, with a draft on the plaintiffs for what was claimed to be the price of the goods, to a bank at Los Angeles, with directions to deliver the bill of lading to the plaintiffs on payment of the draft; that the draft was presented to plaintiffs for payment, and payment was refused, whereupon the bill of lading and draft were returned to defendants S. Kuhn & Sons. The goods arrived at Los Angeles, and after being kept the usual length of time by the railroad company, were removed to Naud's warehouse, and stored for the consignees, Scott & Co., with directions to hold the goods subject to the order of Richard Gray, general freight agent of the railroad company. The defendants Scott & Co. and S. Kuhn & Sons were not served with process, nor did they appear in the action. The defendants who did appear and against whom the judgment was entered were Henry and Weyse, the latter the owner of and the former an employee in Naud's warehouse. If the delivery of the goods to the common carrier at Cincinnati was a delivery to the plaintiffs, the latter could not take them from the possession of the former without paying the legitimate charges for transportation, and it is at least questionable whether such charges in full have been paid or tendered.

There were two questions which had to be determined in favor of the plaintiffs before they could recover possession of the property: First, that it had been delivered to them; second, that the transportation charges had been paid or tendered to the common carrier. As to the delivery, it is sufficient to say that the fact of the alleged vendors having taken a bill of lading, in which they were designated as consignees, militates very strongly against the position of the plaintiffs that the goods were delivered to them.

In Benjamin on Sales, third American edition, section 399, it is laid down as a rule that "where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading as the one to whom they are to be carried. The fact of making the bill of lading deliverable to the order of the vendor, is, when not rebutted by evidence to the contrary, almost decisive to show his intention to reserve the jus disponendi, and to prevent the property from passing to the vendee."

We have recited a sufficient number of facts to show that the evidence, when viewed in the most favorable light for the plaintiffs, was conflicting upon the most material issues in the case; and if, as we must assume, the preponderance of evidence in the opinion of the court below was against the plaintiffs, that court was justified in granting a new trial, and this court would not be justified in disturbing that order.

Order affirmed.

We concur: Thornton, J.; Myrick, J.

CITY OF STOCKTON v. DAHL and Others.*

No. 8506; July 18, 1884.

4 Pac. 369.

Street Assessments—Assessment Lists—Evidence—Pleading.—Under the provisions of the statutes, as applied to actions to enforce street assessments, the assessment lists do not prove even prima facie that the city council "has caused a survey and estimate to be prepared of proposed work, to be filed with the city clerk," or "fixed a time for the hearing upon such proposition," or ordered work or improvements to be done; nor are the lists evidence of a publication of notice soliciting bids, or of the awarding of a contract, or of any of the acts of officers of the municipality which precede, at least, the doing of the work. None of these acts separately, or all of them together, constitute the levy of an assessment, yet all of them must be averred, and, if they are denied, must be proved by competent evidence.

APPEAL from the Superior Court of San Joaquin County.

S. L. Carter and J. A. Louttit for appellant; Byers & Elliot for respondent.

By the COURT.—1. A general demurrer that the complaint, as amended, does not state facts to constitute a cause of action was overruled by the court below, and, after trial, judgment was ordered and entered for defendant. Respondent now contends that the judgment should be affirmed, because the demurrer ought to have been sustained, for certain reasons:

First. As against a general demurrer, at least, the averment in the complaint, "Market street, in said city, ... was, on or about the first day of January, 1879, and ever since has been an open public street used as such, and dedicated to the public use in said city of Stockton, in the county of San Joaquin, state of California," is a sufficient averment that the street named is in the city of Stockton.

Second. The complaint alleges that the resolution of intention was published as required by the city council.

*Reversed in bank. See 66 Cal. 377, 5 Pac. 682.

Third. If the notice soliciting bids was actually published, it is unimportant that a portion of a resolution of the council directed the street committee to solicit bids.

The charter does not require, when an order is made that work be done, the council shall in terms direct the clerk to advertise for bids, or that the contents of the notice to be published by the clerk shall be set forth in the resolution ordering work, unless, perhaps, when the work is the building, etc., of sidewalks, or the estimated cost does not exceed $100: Stats. 1871–72, p. 606, sec. 26. Section 27 of the charter provides that "a notice signed by the clerk" shall be published. The complaint avers that a notice, signed by the clerk, containing the requirements of the statute, was published for a time stated, being the time required by the law.

Fourth. A resolution of the council appointed the street committee to award the contract, etc. The statute (page 606, sec. 27) empowers the council, "or its committee therefor appointed, ... to open and declare said bids and award the contract." It requires this to be done "in open meeting" of the council or committee, as the case may be. The complaint alleges it was so done.

Fifth. The statute (page 608, sec. 29) gives an appeal to the council by any person claiming to be aggrieved by the assessment, and authorizes the council to "correct, alter, or modify" an assessment. We know of no constitutional inhibition upon such legislation.

Sixth. The complaint does allege proper publication of notice that the council would sit at a certain time to hear appeals.

2. At the trial in the court below the plaintiff gave in evidence the assessment lists, showing list of delinquents, of whom defendant appeared as one, and rested. The defendant offered no evidence. Section 29 of the charter provides: "Such lists may be used as evidence in any suit, in the same manner and with like effect as is provided for city delinquent tax lists by this act." The provision with reference to city delinquent tax lists is that they "shall be evidence in any court to prove the delinquency, property assessed, the amount of taxes due and unpaid, and that all forms of law in relation to the levy and assessment of said taxes have been complied with": Stats. 1871–72, p. 604, sec. 21. It is quite evident

that under these provisions of the statute, as applied to actions to enforce street assessments, the assessment lists do not prove, even prima facie, that the city council "has caused a survey and estimates to be prepared of proposed work, to be filed with the city clerk," or "fixed a time for the hearing upon such proposition," or ordered work or improvements to be done. Nor are the lists evidence of a publication of notice soliciting bids, or of the awarding of a contract, or of any of the acts of officers of the municipality which precede, at least, the doing of the work. None of these acts separately, nor all of them together, can be said to constitute the "levy" of an assessment. Yet all of them must be averred, and if, as in the case before us, they are denied, they must be proved by competent evidence.

Judgment and order affirmed.

BIGGERSTAFF v. BRIGGS.

No. 9421; July 18, 1884.

4 Pac. 371.

Contract—Action for Breach—Pleading.—In an action for breach of contract it is not necessary to allege as part of the contract, which was for excavating and cutting ditches by machine, that the machine should be so employed as not to injure defendant's vines; stipulations necessary to make a contract reasonable are implied.

Contract—Action for Breach.—Evidence of the Expense of digging a ditch in a manner materially different from the mode provided as a test of value in the contract alleged by plaintiff was irrelevant, because he was not entitled to recover anything unless the actual contract was substantially the same as that by him alleged.

Contract—Action for Breach.—Where Plaintiff Swore to an Offer to Commence Work, he is entitled to prove facts tending to show how he was prevented from performing his contract, and for that purpose may testify to a message delivered to him by the foreman of defendant. The question of agency is for the jury.

Contract—Action for Breach—Notice.—It is a Question for the Jury whether a notice to defendant was left at his residence with his wife, and whether it reached him.

APPEAL from the Superior Court of Yolo County.

This was an action for damages for a breach of contract. Defendant had agreed to hire plaintiff to cut two hundred miles of ditch with his ditching machine at one-half the price the same would cost to cut by hand, such price to be ascertained by cuttting one mile by hand in a specified manner. Plaintiff alleges that he was ready to perform the work, when defendant notified him not to proceed. The court rendered judgment for plaintiff. Defendant appealed.

J. C. Ball and J. Craig for appellant; W. B. Treadwell and F. E. Baker for respondent.

By the COURT.—1. Appellant contends the verdict was not sustained by the evidence, because the evidence showed, while the complaint does not allege, that it was part of the agreement between the parties that the axle of the ditching machine should be shortened, if necessary, so that the wheels should run between the rows of vines. But it was not necessary to allege, as part of the contract, that the machine should be so employed as not to injure defendant's grapevines. Stipulations necessary to make a contract reasonable are implied: Civ. Code, 1655. "If the parties expressly provide, not anything different, but the very same thing which the law would have implied, this provision may be regarded as having been made twice—by the parties and by the law. . . . . The expression of those things which the law implies works nothing": 2 Pars. Cont., side p. 515.

2. Appellant also contends the contract proved differed materially from the contract alleged, in that the evidence shows the contract to have been that the ditch was to be ten inches wide and twenty inches deep, with a concave bottom, suitable for the reception of irrigating pipes, while the complaint alleges the ditches "were to be cut of uniform width of ten inches, and excavated to a uniform depth of twenty inches." The complaint, however, alleges the ditches were to be cut with a certain machine, which, there was evidence tending to prove, would form a concavity at the bottom.

3. The court did not err in sustaining the objection to the question asked the witness Gould, as to how much it would be worth to excavate a ditch in a manner materially different

from the mode provided in the contract, as alleged in the complaint. The court charged the jury: "In this case the plaintiff must prove the contract as alleged in the amended complaint, and, unless you find from the evidence that the defendant agreed upon and understood all the parts of the contract, as set forth in said amended complaint, you must find a verdict for the defendant."

Evidence of the expense of digging a ditch in a manner materially different from the mode provided, as a test of value, in the contract alleged by plaintiff, was irrelevant, because plaintiff was not entitled to recover anything unless the actual contract was substantially the same as that by him alleged.

4. The instructions requested by defendant (the same being copied from two separate subdivisions of section 2061 of the Code of Civil Procedure) had already been given by the court.

5. It was not error to allow the plaintiff (who testified Bartlett was Briggs' foreman) to testify to a message delivered to him by Bartlett from the defendant. The question of Bartlett's agency was one of fact for the jury. Plaintiff swore to an offer to commence work, and was entitled to prove facts tending to show how he was prevented from performing his contract.

6. It was a question of fact for the jury whether a notice to defendant was left at his residence with his wife, and whether such notice reached him. The testimony of the witnesses plaintiff and Hutchins, given after the defendant rested, with reference to the delivery of such written notice to the wife of defendant, was not objected to on the ground that it was not proper as evidence in rebuttal.

7. Any testimony which the witness Blowers might have given in respect to the cost of digging a ditch such "as he had described" would have been irrelevant. He had described a ditch entirely different from that provided for by the contract between the parties.

Judgment and order affirmed.

WEINER v. KORN.

No. 7635; July 18, 1884.

4 Pac. 373.

Appeal—Bill of Exceptions—Certificate of Judge.—Where there is no bill of exceptions, nor certificate of the judge that the papers printed in the transcript were used on the hearing of the motion which resulted in the making of the order appealed from, the order will not be reviewed.

APPEAL from the Superior Court of Merced County.

Bennett & Wigginton for appellant; J. K. Law for respondent.

By the COURT.—This is an appeal from an order that an execution issue in the above-entitled action. There is no bill of exceptions, nor certificate of the judge of the court in which the order was made that the papers printed in the transcript were used on the hearing of the motion which resulted in the making of the order appealed from. Under such circumstances we cannot review that order.

Order affirmed.

WILLIAMS v. BENICIA WATER CO.

No. 9416; July 18, 1884.

4 Pac. 382.

Appeal—Bill of Exceptions—Motion for New Trial.—In the absence of a bill of exceptions, the order denying defendant's motion for a new trial will not be reviewed on appeal.

APPEAL from the Superior Court of Solano County.

L. B. & L. Mizner for appellant; Jos. McKenna and Jos. F. Wendell for respondent.

By the COURT.—In the absence of a bill of exceptions we cannot review the order denying the defendant's motion for a new trial, and the appellant does not insist that the complaint does not state facts sufficient to constitute a cause of action or that the findings do not support the judgment.

Judgment and order affirmed.

REYNOLDS v. WESTON.

No. 8150; July 19, 1884.

4 Pac. 374.

Trust Deed.—In an Action to Determine the Rights to Property under a deed of trust, the court must follow the provisions of the trust, and, where such trust provides for the sale of the whole of such property, the court is not authorized to order a sale of a part thereof.

APPEAL from the Superior Court of Santa Clara County.

This was a proceeding to determine the rights of parties to property under a deed of trust. The provisions of such trust were that the trustee should conduct certain litigation regarding the trust property, and when the same was settled sell the property and make certain dispositions of the proceeds. The lower court decreed that the trustee should hold the land till the litigation "be terminated as to the whole or any part of the premises, or when the litigation concerning the premises or any part thereof shall have been otherwise finally ended," the trustee might proceed to sell the same under the directions of the trust. The other facts appear in the opinion.

Wm. L. Gill for appellant; C. D. Wright for respondent.

By the COURT.—The decree seems to follow the provisions of the deed of trust in authorizing a sale of the premises conveyed to the plaintiff when he shall obtain possession thereof by virtue of a judgment in an action then pending, in which the right of possession was involved, except in the

particular hereinafter noted. As to the compensation to which the court found plaintiff entitled, and decreed that he should be paid out of the proceeds of said sale, we are not prepared to say that the amount is unreasonable. The deed contained the agreement that Reynolds should hold the land until the litigation be finally ended; the decree authorizes a sale when the litigation be finally disposed of as to the whole or any part of said premises. The decree should be modified by striking out the words "or any part" and "or any part thereof." The court below is directed to modify the decree in this particular, and in all other respects the judgment is affirmed.

MILLICH v. GUTTERNICH.

No. 8169; July 24, 1884.

4 Pac. 411.

Judgment—Findings.—Judgment Held not Sustained by the findings.

Evidence—Right to Contradict Witness.—Where Evidence of plaintiff is material, it is competent for defendant to contradict him, and refusal to allow him to do so is ground for reversal.

APPEAL from the Superior Court of Santa Cruz County.

This was an action under the forcible entry and detainer law to recover the possession of certain premises and damages for the withholding thereof. Plaintiff alleged a lease by him to defendant, which lease had expired, and that since the expiration of the lease defendant refused, though duly notified, to deliver possession of the premises to plaintiff.

F. J. McCann for appellant; Goldsby & Cloud for respondent.

By the COURT.—This action was properly brought under section 1161 of the Code of Civil Procedure, but the judgment of the court below must be reversed for errors in the proceedings.

In the first place, the findings do not support the judgment. No such lease as that set forth in the complaint is found by the court; but, on the contrary, a contract for a lease is found essentially different from the terms of the lease which is declared on, and is the foundation of plaintiff's action.

There was also error in the ruling of the court found in the fourth bill of exceptions. The plaintiff testified that he was not in the city of Santa Cruz on the twenty-third day of January, 1879. This was material evidence in the case, and it was competent for the defendant to contradict him on this point.

For these errors the judgment must be reversed and the cause remanded for a new trial. So ordered.

Estate of CROZIER.

No. 9119; July 25, 1884.

4 Pac. 412.

Will—Revocation of Probate.—An Averment, in a Petition for revocation of the probate of a will, "that at the time of signing said supposed will by him the said James Crozier was not of sound and disposing mind," but, on the contrary, said deceased was at said time of unsound mind, is a sufficient averment of the fact that testator was of unsound mind.

APPEAL from the Superior Court of San Joaquin County.

Byers & Elliot, Campbell & Muenter and W. L. Dudley for appellant; D. S. Terry and Louttit & Lindley for respondent.

By the COURT.—The demurrer to the petition for revocation of the probate of the will was properly overruled. The petitioner alleges that one of the grounds on which she asks for such revocation is "that at the time of signing said supposed will by him the said James Crozier was not of sound and disposing mind, but, on the contrary, said deceased was at said time of unsound mind." If this is not an averment that he was of unsound mind, we do not know what would be.

Decree affirmed.

NUNAN v. SUPERIOR COURT.

No. 9513; July 26, 1884.

4 Pac. 416.

Certiorari.—Where the Superior Court has Jurisdiction over the subject matter and the party, an application for a writ of certiorari or review will be denied.

Application for a writ of certiorari or review, to review an order committing the petitioner for contempt, for failing to pay over moneys alleged to have been received by him as sheriff to plaintiff's attorney in the court below. The petition showed that the order to pay was made on notice to the petitioner.

M. C. Hassett for petitioner; W. R. Daingerfield for respondent.

By the COURT.—Application for writ of review. The superior court had jurisdiction over the subject matter and the party.

Application denied.

THOMPSON and Others v. SPRAIG.*

No. 9496; July 26, 1884.

4 Pac. 418.

Dismissal of Action.—Where Defendant in His Answer Sought Affirmative Relief, an attempted dismissal of the action by plaintiffs, on the day before the case was to be called for trial, was a nullity.

Trial—Judgment in Absence of Plaintiff.—A case having been regularly set for trial, of which plaintiffs had notice, it was their duty to have attended at the time appointed, and a judgment in their absence is not error.

*Reversed in bank. See 66 Cal. 350, 5 Pac. 506.

APPEAL from the Superior Court of Amador County.

This cause having been set for trial and being regularly called on the day set, and the plaintiffs not appearing, defendant proceeded with his case. Thereupon the court rendered judgment for defendant. Plaintiffs appealed. The other facts appear in the opinion.

Egan & Armstrong for appellants; A. Caminetti for respondent.

By the COURT.—Defendant, in his answer, having sought affirmative relief, the attempted dismissal of the action by the plaintiffs, the day before the case was to be called for trial, was a nullity: Code Civ. Proc., sec. 581. The case having been regularly set for trial, of which plaintiffs had notice, it was their duty to have attended at the time appointed.

Order affirmed.

HEINLEN v. CENTERVILLE & KINGSBURY IRRIGATION DITCH CO.

No. 8700; July 26, 1884.

4 Pac. 417.

Default—Setting Aside for Accident and Surprise.—Where defendant answers, but, failing to appear at the trial, judgment was rendered for plaintiff, there was no abuse of discretion on the part of the court below in granting defendant's motion to vacate the judgment and award a new trial, on the grounds of accident and surprise.

APPEAL from the Superior Court of Tulare County.

In this cause defendant answered, but, having failed to appear at the trial, the court, after proofs taken, rendered judgment for plaintiff. Subsequently, defendant moved to vacate such judgment and for a new trial, on the ground of accident and surprise, in that defendant never received or had notice of the fact that the cause had been set for trial,

which motion was granted. From this order plaintiff appealed.

Atwell & Bradley and C. A. Heinlen for appellant; S. C. Poage and W. A. Tupper for respondent.

By the COURT.—There was no abuse of discretion on the part of the court below in granting defendant's motion to vacate the judgment and award the defendant a trial.

Order affirmed.

PAYNE v. KRIPP.

No. 9500; July 26, 1884.

4 Pac. 426.

Evidence—Admission of Counsel.—In an Action for Damages for Personal Injuries, defendant's counsel on the trial admitted that "the allegations in the complaint in respect to the amount of damages sustained by plaintiff were not denied by the answer," upon which admission the court sustained an objection to questions in relation to the amount of such damages. As a matter of fact the answer did put in issue such allegations, and the questions were therefore proper and admissible.

APPEAL from the Superior Court of Yolo County.

B. A. Hudson and J. C. Ball for appellant; W. B. Treadwell for respondent.

By the COURT.—Action for damages for a personal injury sustained by the plaintiff at the hands of the defendant. On the trial the plaintiff was asked: "How much, if anything, have you laid out or expended for the services of physicians, and for nursing, by reason of the injury to your jaw here complained of?" The court sustained an objection to this question, and excluded all testimony in relation to that matter, upon an admission made in open court by defendant's counsel "that the allegations of the complaint in respect to the amount of damage sustained by the plaintiff were not denied

by the answer." As a matter of fact, the answer did put in issue the allegations of the complaint in respect to the amount of damage sustained by the plaintiff. The question was proper, and should have been answered.

Judgment and order reversed and cause remanded for a new trial, with leave to the plaintiff to amend his complaint if he shall be so advised.

BERNHEIM v. PORTER.

No. 7650; July 27, 1884.

4 Pac. 446.

Partnership—Absence of Partner from State—Power of Copartner.—The fact that one member of a partnership leaves the state to reside out of it does not operate to dissolve the partnership carried on within the state, and, in such absence of his copartner, the remaining one may make an assignment of any part of the partnership property to a creditor, and such assignment will have precedence over a subsequent sale by the absent partner.

APPEAL from the Superior Court of Santa Cruz County.

F. Adams and J. M. Lesser for appellant; Andrew Craig for respondent.

McKEE, J.—This was an action to recover damages for the taking and detention of some personal property, which consisted of an engine and boiler and the machinery of a sawmill. The plaintiff's claim of title to the property was founded upon a bill of sale made to them by one J. J. Blackburn on the 30th of January, 1878. But at that time Blackburn had no possession of the property to deliver and no title to it to transfer; for the property was then in the possession of the defendant, to whom it had been delivered, under and in connection with a bill of sale of it, which was given to the defendant on the 30th of November, 1877, by one Derastus Lear. Lear, the defendant's vendor, had originally purchased from the defendant the engine and boiler for

the purpose of using them in driving a shingle-mill on a tract of land in Santa Cruz county which belonged to him. That purchase was made in August, 1876. Being unable to pay all the purchase money, Lear secured the defendant for the payment of the balance due upon the purchase by his two promissory notes, secured by mortgage upon the tract of land and the engine and boiler "erected or attached to and embedded in the land, together with all and singular the machinery attached to and connected with said engine and boiler." That mortgage was dated and recorded August 7, 1876. Four months afterward, Lear, by deed, conveyed the land subject to the mortgage to J. J. Blackburn. When Lear purchased the engine and boiler he and Blackburn were partners, under the firm name of Lear & Co., in the shingle and lumber business and in running the sawmill on the tract of land. The engine, boiler and machinery were used by the copartnership in the business, and the court found they were partnership property. After running the business for a time, Blackburn abandoned the control and management of it to Lear, and, without obtaining a dissolution of the partnership or a settlement of its affairs, went to reside in Washington territory. In his absence, Lear, being unable to pay the purchase money mortgage, sold the property to the defendant, and gave him a bill of sale for the same, in the name of the firm, on the 30th of November, 1877, in satisfaction of the notes and mortgage. This sale by Lear transferred the title to the property to the defendant. For, in the voluntary absence of his copartner from the state, Lear had authority to make an assignment of any portion of the copartnership property to a creditor: Civ. Code, sec. 2430; Kemp v. Carnley, 3 Duer (N. Y.), 1; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296.

The absence of Blackburn in Washington territory, where the plaintiffs obtained from him the bill of sale of the 30th of January, 1878, did not operate as a dissolution of the partnership; the partnership still existed; and if Blackburn's individual bill of sale transferred to the plaintiffs any interest in the property, the transfer did not carry with it a right to maintain an action in the nature of trespass or trover against the defendant, who had obtained possession of the property as a bona fide purchaser from the firm. Being still the co-

partner of Lear, the remedy of Blackburn or of the plaintiffs, as his assignees or vendees, lay in an action for the dissolution of the partnership and a settlement of the partnership affairs, so as to ascertain the interest of each in the concern.

The evidence sustains the findings and the findings support the judgment.

Judgment and order affirmed.

I concur: Ross, J.

I concur in the judgment: McKinstry, J.

PEOPLE v. DWYER.

No. 9555; July 28, 1884.

4 Pac. 451.

Intoxicating Liquor—Authority of Board of Supervisors.—Judgment reversed and cause remanded, on the authority of Ex parte Walters, 3 Pac. 894, holding that boards of supervisors have power to regulate the sale of spirituous liquors within their counties by imposing a license on the sale of such liquors at retail.[1]

APPEAL from the Superior Court of Sacramento County.

The facts in this case are the same as in Ex parte Walters, 3 Pac. 894.

Henry Edgerton and Matt. F. Johnson for appellant; A. L. Rhodes, E. J. Pringle and Milton E. Babb for respondent.

By the COURT.—On the authority of Ex parte Walters, 3 Pac. 894, judgment reversed and cause remanded.

[1] Cited and approved in In re Guerrero, 69 Cal. 94, 10 Pac. 266, holding that boards of supervisors may regulate the sale of liquors by imposing licenses upon retailers.

COX v. O'NEIL and Another.

No. 9285; July 29, 1884.

4 Pac. 456.

Vacating Judgment—New Trial—Surprise—Newly Discovered Evidence.—No surprise on the part of defendants being shown from the facts, and no new evidence being produced, the orders denying a motion to vacate judgment on the ground of surprise, and denying a motion for a new trial on the ground of newly discovered evidence, were properly made, and are affirmed.

APPEAL from the Superior Court of Santa Barbara County.

Joseph D. Redding for appellant; W. C. Stratton for respondent.

By the COURT.—1. There is no error in the judgment-roll in this case of which we can take cognizance.

2. There is no reviewable error in the order denying the motion made in behalf of the defendant to vacate the judgment on the ground of surprise. The motion was not supported by the affidavit of the defendant; it was made solely upon the judgment-roll and the affidavit of defendant's attorney, in which he deposed that he was prevented by mistake and surprise from appearing in court to attend to the trial of the case on the day that the case was set down for trial. But there is nothing in his affidavit, especially when considered in connection with the counter-affidavit of the plaintiff's attorney, which shows either mistake or surprise on the part of the attorney, caused by any act of the plaintiff or of his attorney, which prevented him from being present in court on the day of the trial. On the contrary, it appears that the attorney, in the exercise of ordinary prudence, could have been present, and that his nonattendance was not due to any fault or omission of duty on the part of his adversary. Under these circumstances, there was no legal mistake or surprise for which the judgment could have been set aside: Haight v. Green, 19 Cal. 113; Mulholland v. Heyneman, 19 Cal. 605; Ekel v. Swift, 47 Cal. 619.

3. There was no error in denying the motion for a new trial made on the ground of newly discovered evidence. The motion was not supported by the affidavit of the defendant nor of any witness who would testify to the alleged newly discovered evidence. Besides, the evidence itself only tended to prove a fact which was at issue in the case, and which was proved on the trial; and as the defendant was absent from the trial without legal excuse, the evidence alleged to have been discovered since would have been of no avail to him had he known of it before the trial.

Judgment and orders affirmed.

JACK and Others v. SAUNDERS.

No. 9237; August 2, 1884.

4 Pac. 487.

Appeal.—Where There is a Material Conflict in the Evidence, the judgment of the lower court will not be disturbed on the ground that it was not justified by the evidence.

APPEAL from the Superior Court of San Joaquin County.

J. C. Campbell for appellants; McStoy & Swinserton for respondent.

By the COURT.—Appellants' counsel, in his "points and authorities," insists that the order denying the motion for a new trial should be reversed on the ground that the decision of the court below was not justified by the evidence. We have examined the evidence and found a material conflict therein, and for that reason cannot disturb the order appealed from.

Judgment and order affirmed.

NOCE v. DAVEGGIO,

No. 9387; August 5, 1884.

4 Pac. 495.

Appeal—Entry of Order Nunc Pro Tunc—Time for Appeal.—An order entering judgment nunc pro tunc does not deprive a party of his right to appeal. The time for appeal dates from the actual entry of the judgment.

Partition—Who Entitled to.—A conveyance to plaintiff, vesting in him an undivided interest in land, and making him a tenant in common with defendant, entitled him to a partition; and the fact that he had never been in occupancy of the land, and that his grantors and the defendant were copartners in the crops raised on the land, did not affect his right to partition.

APPEAL from the Superior Court of Amador County.

D. B. Spagnoli and Caminetti & Rust for appellant; G. G. Blanchard and Eagon & Phelps for respondent.

McKEE, J.—It is objected that the appeal in this case was not taken in due time. The case was tried and judgment ordered for defendant on the 30th of September, 1881, but no judgment was entered until the 30th of July, 1883. Then, on motion of defendant's attorney, the court caused judgment to be entered in favor of the defendant nunc pro tunc as of the 30th of September, 1881. The appeal was taken from this judgment on the 27th of November, 1883; it was therefore in time. A nunc pro tunc order does not deprive a party of his right to appeal. The time for appeal dates from the actual entry of the judgment: In re Fifteenth Avenue Extension, 54 Cal. 179.

The action was partition. The answer of the defendant contained a general denial and a plea of partnership existing between himself and the grantor of the plaintiff. On motion the plea of partnership was stricken out. But on the trial of the issue, raised by the general denial, evidence of a partnership was admitted, and the court found as facts that on the 15th of July, 1876, the grantor of the plaintiff and the defendant were co-owners of the land in controversy and co-

partners in cultivating the same, and that these relations existed between them until the 9th of August, 1880, when the cotenant of the defendant conveyed his undivided interest in the land to the plaintiff. And, as a conclusion of law, the court held that the plaintiff was not entitled to partition, and ordered that the action be dismissed and that judgment be entered against the plaintiff for costs.

The decision was against law. The conveyance to the plaintiff vested in him an undivided interest in the land, and made him a tenant in common therein with the defendant, and entitled him to partition. The fact that he had never been in occupancy of the land, and that his grantor and the defendant were copartners in the crops raised on the land did not affect his right to partition: Martin v. Walker, 58 Cal. 590.

Judgment reversed and cause remanded for further proceedings.

I concur: Ross, J.

I concur in the judgment: McKinstry, J.

YEAZELL v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO.

No. 9608; August 12, 1884.

4 Pac. 503.

Appeal.—A Judgment Entered by Consent in the Justice's Court is not appealable, and the superior court is authorized to dismiss such an appeal of its own motion.

Application for writ of review.

John Wade for petitioner.

By the COURT.—The application for the writ is denied. The appeal was taken from a judgment entered by consent in the justice's court, and the superior court was authorized to

dismiss the appeal of its own motion, on an inspection of the record. Such a judgment was not appealable. If the judgment was entered in the justice's court contrary to the stipulation, the remedy was by motion in that court.

PEOPLE v. MURRAY.

No. 10,967; August 12, 1884.

4 Pac. 504.

Prostitution.—Judgment Held not Sustained by the evidence.

APPEAL from the Superior Court of Tehama County.

A. W. Gale and C. W. Ashurst for appellant; Attorney General for respondent.

By the COURT.—The defendant was accused, by information, of taking from her mother a female under the age of eighteen years, for the purpose of prostitution, under section 267, Penal Code. There was no evidence that the infant was taken from the charge or custody of her mother.

Judgment and order reversed and cause remanded for a new trial.

HERZOG v. JULIEN.

No. 9528; August 13, 1884.

4 Pac. 501.

New Trial.—In Case of a Conflict of Evidence the Appellate Court will not interfere with the order of the court below granting a new trial.

APPEAL from the Superior Court of Siskiyou County.

Laura De Force Gordon for appellant; Nichols & Abels and H. B. Warren for respondent.

By the COURT.—Action to recover damages for an alleged malicious prosecution. The jury gave the plaintiff a verdict for twelve thousand dollars. The court below granted a new trial on the ground of excessive damages, and because the verdict was not sustained by the evidence and was contrary to the law and evidence. The evidence was conflicting as to the want of probable cause. In case of conflict, it has been held by this court that it would not interfere with the order of the court below granting a new trial. In Dickey v. Davis, 39 Cal. 565, the court said: "In this court, when there is a substantial conflict in the evidence, we decline to set aside a verdict or finding of facts as being contrary to the weight of evidence, solely because we have had no opportunity to observe the manner of the witnesses, and to decide upon their credibility. But this reason does not apply to the district judge, and though it is the peculiar province of the jury to decide upon the facts submitted to them generally, in doubtful cases the verdict ought not to be set aside as contrary to the weight of the evidence. Nevertheless, if the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. He has had the same opportunity as the jury to observe the manner of the witnesses and to decide upon their credibility, and it is his duty to see that the verdict is not clearly against the weight of evidence. He must exercise a wholesome and discreet supervision over the jury in this respect. 'The fact that there may have been evidence submitted to the jury on both sides of the points at issue does not exclude the exercise of this beneficial supervision. If it did, no matter how weak the testimony on one side and how strong on the other, the judge would be restrained from interference, notwithstanding the verdict was manifestly against the weight of evidence. If such a rule was adopted, litigants would be sure to accommodate themselves to it by introducing mere formal (if they could command no other) evidence to oust the authority of the court': 3 Grah. & Wat. N. T. 1207."

Order affirmed.

ALPERS v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO.

No. 9381; August 14, 1884.

4 Pac. 504.

Certiorari.—Actions on Contract, Commenced in the Justice's Court and appealed to the superior court, are within the jurisdiction of those courts, and therefore not subject to review on certiorari.

Application for writ of review.

R. P. Wright for petitioner.

By the COURT.—This is an application for a writ of review. The action, commenced in the justice's court and appealed to the superior court, was upon a contract, and those courts had jurisdiction. Application denied and proceeding dismissed.

SMYTH v. STOCKTON & COPPERAPOLIS R. CO.

No. 9029; August 18, 1884.

4 Pac. 505.

Railroad Company—Liability for Damage Caused by Fires.—A railroad company is not liable for damages caused by fire escaping from its engines, if such engines are in good order, properly constructed, and supplied with the best appliances in use to prevent the escape of fire, unless the fire escaped through the negligence of the servants of said railroad company in managing such engines.

APPEAL from the Superior Court of San Joaquin County.

W. L. Dudley for appellant; D. S. & S. L. Terry for respondent.

ROSS, J.—The plaintiff sued to recover of defendant damages for the destruction by fire of certain property alleged

to have been communicated by sparks emitted from one of defendant's locomotives. As to whether the engine was in proper order and was properly managed by the employees of defendant at the time in question, the testimony on behalf of the respective parties differed. Upon the conclusion of the evidence the defendant requested the court to charge the jury, among other things, that if they believed from the evidence "that the damages claimed by the plaintiff were caused by fire escaping from defendant's engine, and find further that the engine was in good order, properly constructed, and supplied with the best appliances in use to prevent the escape of fire, then the defendant was not guilty of negligence in such escape of the fire, and is not liable, unless the fire escaped through the negligence of the agents and servants of the defendant in managing the engine and machinery." This instruction was refused. In view of the testimony in the case it ought to have been given: Shear. & R. Neg., 3d ed., secs. 332–334, and authorities there cited.

Judgment and order reversed and cause remanded for a new trial.

We concur: McKinstry, J.; McKee, J.

LAWRENCE and Others v. GETCHEL.

No. 9093; August 26, 1884.

4 Pac. 544.

Costs.—Where the Issue is Found Against the Plaintiffs they are not entitled to recover any costs or disbursements incurred in the action.

Injunction.—The Pleadings of a Party to Whom Relief is Granted must be Sufficient to warrant the relief. Where plaintiff, therefore, does not allege that defendant asserts any claim to his property, he is not entitled to a judgment restraining defendant from asserting such a claim.[1]

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[1] Cited with approval in Dorris v. McManus, 4 Cal. App. 150, 87 Pac. 288, but held not to apply to a suit to quiet title in which the plaintiff cannot know the nature of the defendant's claim until the defendant pleads it.

APPEAL from the Superior Court of Nevada County.

Cross & Simmons for appellants; W. A. Long and J. M. Walling for respondent.

By the COURT.—The plaintiffs' complaint can only be construed as one to obtain an injunction restraining the defendant from the commission of the acts complained of. Upon the cause of action, and the only cause of action set forth in the complaint, the court below found against the plaintiffs. The plaintiffs were not therefore entitled to recover of the defendant any costs or disbursements incurred in the action. Nor, under the pleadings, were the plaintiffs entitled to judgment restraining the defendant from asserting a claim to any part of the property described in the complaint; for the plaintiffs nowhere allege that the defendant asserts any such claim. It is a cardinal rule that the pleadings of a party to whom relief is granted must be sufficient to warrant the relief.

Cause remanded, with directions to the court below to modify the judgment in accordance with the views here expressed.

I concur in the judgment: McKee, J.

WEST v. GIRARD.

No. 8277; August 28, 1884.

4 Pac. 565.

New Trial.—Where Material Issues in a Case are not Disposed of by the verdict of a jury, or the findings of a court, there must be a new trial.

Surface Water.—When Coterminous Tracts of Land are in Such a Position that the lower tract owes a servitude to the other to receive surface water, it cannot be forced back upon the dominant tract by any act of the servient owner.

APPEAL from the Superior Court of San Joaquin County.

F. T. Baldwin and J. C. Campbell for appellant; Byers & Elliot for respondent.

McKEE, J.—Two material issues were submitted to a jury in this case, namely: "(1) Is there, through the land of plaintiff, a natural watercourse which leaves the land of plaintiff on the south, and which passes through into the land of defendant? (2) Has defendant caused said natural watercourse to be obstructed by an embankment along the south line of plaintiff's land?" On both issues the jury failed to agree upon a verdict, and the court did not find upon either of them. Where material issues in a case are not disposed of by the verdict of a jury or the findings of a court, there must be a new trial.

But it is urged that the issues were immaterial, because, besides the averments in the complaint which were traversed by the answer of the defendant, and raised the issues which were not disposed of, it was also averred that the land of the plaintiff "slopes south toward the land of defendant, and the water which passes through the said watercourse and the surface water which falls upon and passes over plaintiff's land flows upon the land of defendant when allowed to pursue its natural course." The action was for the abatement of a private nuisance caused, as alleged, by the filling up of a natural watercourse, and by the obstruction, by an embankment therein, of the natural flow of the water, so as to turn it back upon the plaintiff's land to his damage. It was not an action, as in Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213, to prevent the obstruction of the natural flow of surface water from the land above upon an adjacent lower tract. In that case "there was no stream or watercourse upon the plaintiff's land." In this, it is alleged, there was "a natural watercourse," and that by its obstruction the injury complained of was caused. If such a watercourse existed as alleged, then, as to it, the plaintiff and defendant were riparian proprietors, and it would not be lawful for either of them to do any act which would interfere with the rights of the other therein. A watercourse constitutes part of the soil through which it extends, and when used for any beneficial purpose in connection with proprietary rights, it cannot be filled up or obstructed by any proprietor to the injury of another. If, therefore, the

surface water falling upon the plaintiff's land, "when allowed to pursue its natural course," flows into and through a natural watercourse from the plaintiff's land upon the land of the defendant, the latter has no right to fill up the watercourse, or to build in it an embankment or other barrier, on his own land, to obstruct the natural flow of the surface water, or of the water of the stream, and force it back upon the plaintiff's land. When coterminous tracts of land are in that position, the lower tract owes a servitude to receive the surface water from the upper tract, especially if the water turns into a watercourse extending through both tracts or onto the lower tract; and the right of the owner of the dominant tract to have the water reach the watercourse, either on his own land or upon the land of the servient owner, cannot be interfered with. The water cannot be forced back upon the dominant tract by any act of the servient owner. The owner of the dominant tract has a right to its natural flow into the watercourse. But to support a judgment for the violation of such a right, the existence of the watercourse and its obstruction, if questions at issue, must be admitted or proved, and found by the verdict of the jury or the finding of the court. The allegations, finding and judgment must correspond.

Judgment and order reversed and cause remanded for a new trial.

We concur in the judgment upon the ground that all of the material issues of fact were not determined in the court below: Ross, J.; McKinstry, J.

SEDGWICK, Executrix, etc., v. SEDGWICK.

No. 8697; August 29, 1884.

4 Pac. 570.

Executor—Purchase by, at Execution Sale.—The executor of an estate has no authority to bid for or purchase for the estate, at an execution sale, property sold to satisfy an execution on a judgment in favor of the estate, and, such sale being void, gives no cause of action against the estate for damages by reason of such sale.[1]

APPEAL from the Superior Court of San Joaquin County.

J. B. Hall for appellant; Byers & Elliot for respondent.

By the COURT.—The executor or administrator of an estate of a deceased person has no authority to bid in for the estate, at execution sale, real or personal property levied upon to satisfy an execution issued upon a judgment in favor of the estate. The execution sale of the real estate of the defendant to the plaintiff, as executrix of the estate of Thomas Sedgwick, was therefore void. And as it did not, in law or fact, disturb the defendant in the possession of his land, and the executrix paid no money upon the sale, the defendant had no cause of action against the estate to recover damages resulting from the sale.

Judgment affirmed.

[1] **Cited** in San Domingo Co. v. Grand Pacific Co., 10 Cal. App. 420, 102 Pac. 550, and distinguished from a case where the point is urged by a defendant, a stranger to both the estate and the judgment debtor, in a suit for an injunction by one who, likewise a stranger, holds title of the chain of which such a sale is a link.

FLEMING v. HAWLEY.

No. 8854; September 1, 1884.

4 Pac. 576.

Continuance — Dismissal of Complaint — Intervention.— The granting of a continuance and dismissal of a complaint in intervention being, under the circumstances, discretionary with the court, held that, where there is no abuse of discretion, the order of the lower court refusing the same will not be interfered with on appeal.

APPEAL from the Superior Court of Tulare County.

This was an action for the recovery of certain flasks of quicksilver. Defendant denied plaintiff's right to the same, claiming ownership in himself. The Empire G. & S. M. Co., being allowed to intervene, claimed possession and ownership in itself, which was denied by both plaintiff and defendant. On the trial, no counsel appearing for the intervener, the defendant's counsel, in behalf of the intervener, moved for a continuance, which, being refused, he moved for a dismissal of the complaint in intervention without prejudice. This was refused, and thereafter judgment was rendered for plaintiff and against defendant. The intervener now appeals.

W. H. Hart and Atwell & Bradley for appellant; Edwards & Dubrutz for respondent.

By the COURT.—We cannot say the court below abused its discretion in refusing a continuance of the trial of the cause. Nor, under the circumstances appearing, can we hold as error the refusal of the court to permit the dismissal of the complaint in intervention. There was no judgment against the intervener for costs, as seems to be supposed by counsel.

Judgment and orders affirmed.

PACKARD v. JOHNSON.*

No. 8550; September 11, 1884.

4 Pac. 632.

Evidence—Judgment—Judgment-roll.—Plaintiff cannot Complain that a judgment-book introduced by defendant did not prove the judgment, if he himself introduced evidence of the judgment by introduction of the judgment-roll, although he introduced such judgment-roll for another purpose only.

Limitations—Pleading.—The Statute of Limitations is Sufficiently pleaded by reference in the answer to the sections of the code.

Adverse Possession—Color of Title.—A Decree Adjudging that a party or his grantor was the owner or seised of some estate in the lands in controversy is a "decree or judgment of a competent court," so as to operate as color of title in favor of one who enters in good faith under such a decree and holds adversely for five years, and will entitle such person to the benefit of the statute of limitations.

Quitclaim Deed—Transfer of Title.—A Quitclaim Deed is as Effectual to transfer title as a grant, or bargain and sale.

Evidence—Declarations.—Evidence, With Respect to His Title, of declarations made by a party after he had disposed of his interest in the property, is not admissible.

Adverse Possession—Title of Real Owner.—One may Hold Adverse Possession of lands so as to acquire title, without having knowledge of the nature of the title of the real owner.

Patent to Land—Certificate of Purchase—Act of 1858.—Where, under the act of 1858, a certificate of purchase of certain lands is issued to a person by the state, and it recites that payment in full has been made, such person thus acquires a perfect equity as against the state, and entitles him to the benefit of the statute of limitations from the date of the certificate.

Swamp Lands.—The Legislature of the State Has Power to Grant swamp and overflowed lands to private persons, and such lands are taken subject to state legislation in regard to the reclamation thereof.

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*Cited and followed in Packard v. Moss, 68 Cal. 124, 8 Pac. 819, the facts in which case were essentially the same as those in the other.

Cited and approved in First Nat. Bank of Enid v. Yoeman, 17 Okl. 618, 90 Pac. 414, where the same rule of nonadmissibility is applied to declarations of ownership made by the grantor, in a chattel mortgage, after executing the instrument.

APPEAL from the Superior Court of San Joaquin County.

J. B. Hall for appellant; J. H. Budd and F. F. Baldwin for respondent.

By the COURT.—1. It is contended by appellant (plaintiff) that the court below erred in admitting in evidence the entry of a judgment in the judgment book of the district court. It is urged that the only competent evidence of the judgment was the judgment-roll. But, subsequently to the introduction of the book by defendant, the roll was introduced by plaintiff. It is said the plaintiff introduced the roll for the single purpose of proving the judgment to be void. The plaintiff, having cured the defect in defendant's evidence of the judgment, cannot rely upon his specific objection that the judgment-book did not prove the judgment. The validity or invalidity of the judgment is a very different matter.

2. The statute of limitations was sufficiently pleaded by the reference in the answer to sections of the code: Code Civ. Proc., sec. 458.

3. But it is further claimed the judgment is void on the face of the roll, and was not, therefore, "the judgment of a competent court," such as could set the limitation running: Code Civ. Proc., sec. 322. "The decree or judgment of a competent court," mentioned in section 322 of the Code of Civil Procedure, is a decree or judgment adjudging that a party, or his grantor, was the owner or seised of some estate in the lands. One who enters in good faith under such a decree, like one who enters under a conveyance purporting to convey the fee, and who continues in adverse possession (evidenced by the acts mentioned in section 323) for a period of five years, may claim the benefit of the statute. It is sufficient if a deed under which the adverse possessor enters purports upon its face to convey the lands in question, and describes them with such definiteness that they can be easily identified, although in fact it is invalid and insufficient to pass the title, or is voidable as a deed from an infant, or from an officer who had no authority in fact to convey the land; or although such authority, if he had any, is not shown; or although made under a sale which was subsequently invalidated by individual or judicial action. So, a tax collector's deed, a paper purporting

to be a will, a deed from a mortgagee, or an unrecorded deed, is good color of title: Wood, Lim., p. 525, sec. 259, and cases cited.

The defendant having introduced the sheriff's deed purporting to convey the premises in controversy, it is immaterial that plaintiff proved the judgment to be void.

By section 323 of the Code of Civil Procedure it is enacted that land shall be deemed to have been possessed and occupied by one claiming under a written instrument: "Where it has been usually cultivated or improved; where it has been protected by a substantial inclosure."

Sanor, the grantee of the purchaser at the sheriff's sale, testified that immediately after taking his deed, on the 24th of September, 1864, he moved onto the land, built a barn and house, and fenced it and put stock on it. "I put a post fence and rails and plank around it—a four-board fence around part of the land, and a part three-board. I got the land fenced, and got my house and barn on it, three or four months after my purchase from Cocke. From the time I bought of Cocke I had the exclusive use of the land, and enjoyed all the profits until I sold to defendant." He then stated facts tending to prove that plaintiff had knowledge that he claimed to be the sole owner while he occupied it. And the defendant testified that he fenced the demanded premises, with other land (the whole being land conveyed to himself and wife by Sanor, December 3, 1864), soon after he received the deed from Sanor, all in one inclosure. "I have kept the land fenced ever since I first fenced it, and the road has been fenced ever since that time. I have occupied and used the land exclusively—fenced with my other land. During all that time I have claimed the ownership; nobody else has claimed it that I know of. If there have been any rents and profits I have had them. I have paid all the taxes on it with the rest of my land," etc. This action was commenced October 28, 1881. The foregoing testimony and other evidence in the record justified the jury in finding an ouster of plaintiff more than five years before the commencement of the action, and an adverse holding for more than the statutory period. If it be conceded that the judgment upon which the sheriff sold and conveyed to the grantor of defendant's grantor in 1860 was void, that fact did not deprive the defendant or his

grantor, Sanor, of the benefit of the statute. As we have seen, a sheriff's deed, although the officer has no authority to sell, may give color of title.

In King v. Randlett, 33 Cal. 318, the court, after deciding that the party there claiming the benefit of the statute of limitations did not enter under a deed or conveyance, but under an instrument only purporting to assign one's right, title and interest in and to a constable's deed, added: "Whether, had Garrison conveyed to the defendant, the judgment and constable's deed would have been admissible as showing color of title in aid of defendant's plea, it is therefore unnecessary to determine. But upon this point, see Jackson v. Woodruff, 1 Cow. (N. Y.) 286, 13 Am. Dec. 525, and Gilbert v. Manchester Iron Co., 7 Wend. (N. Y.) 511."

Jackson v. Woodruff, so far as it bears upon the question before us, only decides that, where one claims under a deed as color of title, the description in the deed must include the lands in controversy. Gilbert v. Manchester Iron Co. is a miscitation. The court evidently intended to refer to Livingston v. Peru Iron Co., 9 Wend. 512. That was a case in chancery where the bill alleged that a conveyance of certain premises had been obtained by defendant by fraud. The court held a deed fraudulently obtained is not available as the foundation of an adverse possession, because the party setting up adverse possession must have entered bona fide.

We understand the court to have held, in Bernal v. Gleim, 33 Cal. 675, that the sheriff's deed in evidence in that case was void on its face. Certainly, none of the cases there cited sustain the proposition contended for by appellant in the case at bar. Besides the two New York cases already commented upon, Jackson v. Frost, 5 Cow. 346, La Frombois v. Jackson, 8 Cow. 589, 18 Am. Dec. 463, and Jackson v. Waters, 12 Johns. 365, are referred to. In the first of the three cases last named it was held, under the New York statute, that where one entered upon land, claiming it to be a gore between two patents, there was not such adverse possession against the true owner as would ripen into a right. In La Frombois v. Jackson, 8 Cow. 589, 18 Am. Dec. 463, it was held not to be necessary that an adverse possession, in order to be available within the statute of limitations, should commence under an effectual deed; and that an executory contract, the consideration being

paid, is a sufficient basis of claim under color of title. In Jackson v. Waters, 12 Johns. (N. Y.) 365, the court decided that a possession taken under a grant from the French-Canadian government, prior to the conquest of Canada by the British, of land now in the state of New York, was not such an adverse possession as would defeat the operation of a subsequent grant of the same land under the provincial government of New York. None of these cases hold that a sheriff's deed, following a sale under an invalid money judgment, cannot be made available as color of title. In the case at bar the questions of ouster and of adverse holding for five years after the ouster were questions of fact, and there was evidence at the trial in the court below to sustain the finding of the jury upon that issue.

4. We think the admission in evidence of the petition of Melville to set aside the judgment in Cocke v. Melville, and the order of the district court denying his motion could not have injured the plaintiff. The court, at the trial of the present case, expressly instructed the jury that the judgment was void.

5. The deed from Cocke to Sanor was admissible. From a very early day it has been held here that a quitclaim deed is as effectual to transfer title as a grant, or bargain and sale. Such a deed, therefore, gives color of right.

6. The conveyance of March 19, 1862, from plaintiff to defendant of lands adjoining the demanded premises was, at most, irrelevant and immaterial. It could not have prejudiced the plaintiff.

7. The evidence of Sanor with respect to his having improved and inclosed the premises after the receipt of his deed from Cocke was admissible under the plea of the statute of limitations.

8. The court properly rejected evidence of declarations of Sanor, with respect to his title, made after he had sold and conveyed to defendant.

9. The court did not err in refusing to instruct the jury that one cannot hold possession of lands adversely, so as to acquire the title, unless he has knowledge of the nature of the title of the real owner.

10. It is contended by appellant that, inasmuch as the title to the lands did not vest in the state until the certification by

the land department in December, 1866, and as ten years from that date had not lapsed when this action was brought, the plaintiff was not barred of a recovery. The certificate of purchase, under which plaintiff claims, was issued on the thirtieth day of August, 1858, under the act of April 21, 1858. By that act no certificate could issue until the whole purchase price of the land was paid, and the certificate in evidence herein recites that Melville had made payment in full. He thus acquired (at least, from the time the land was listed to the state) a perfect equity as against the state, and the case shows that no patent has been issued to him or his assignee. More than five years had elapsed after the land was certified to the state when this action was commenced. In Manly v. Howlett, 55 Cal. 94, it was said: "It is true that before the patent should issue the statute of limitations might build up a title in the possessor, as between the parties, so as to determine their rights upon the then condition of things; but the issuance of the patent gave new rights; the patentee and his grantees then had a right superior to any theretofore owned or held by them, viz., the ownership of the land. They then had something which the state had not theretofore parted with. In a suit for the recovery of the land, commenced after the issuance of the patent, the statute of limitations cannot be held to have commenced running prior to the date of the patent."

Two circumstances existed, or were assumed to exist, in Manly v. Howlett, which do not appear in the case at bar: First. In that case it appeared that subsequent acts were to be performed by the party claiming under the certificate before he would be entitled to a patent, viz., payment of the annual interest, and of the deferred purchase money. In the case before us, full payment of the purchase money had been made to the state before the certificate issued. Second. In that case a patent had been issued to the assignee of the certificate, before the action was brought. In the case at bar, neither the original holder of the certificate nor any assignee of his had received any further muniment of title when this suit was commenced.

As we have seen, when this action was commenced more than five years had elapsed after the certification of the land to the state. When the land was certified, the holder of the certificate of purchase, who had paid for the land and fully complied

with all the terms of his contract, became entitled absolutely to the patent. He became, as against the state, the owner of the land, at least equitably, and the state could not have recovered its possession. He acquired a perfect equity, and the act of 1858 clearly provides that when the land shall be certified to the state, the title thus acquired shall inure beneficially to the purchaser who has complied with the conditions imposed upon him, the state retaining, at most, but the naked legal title. Plaintiff, therefore, if he can be treated as the holder of the certificate, had a title with right of possession from December, 1866, of which his certificate was prima facie evidence, and of which his certificate and the certification to the state were conclusive evidence. His title, such as it was, gave him the right of possession, and it remained unchanged for more than five years prior to the commencement of the action. Even if it should be conceded that he may commence a new action within five years after he shall receive a patent for the land, he cannot recover, as against an adverse possessor, on a title acquired more than the statutory period before the present action was commenced.

11. It is said that the state is charged with a trust in respect to land of the swamp-land donation, and that, if the state may be disseised at any time before reclamation, the power to execute the trust is gone, for the subject of the trust is then under the absolute and exclusive dominion of the disseisor. It is not necessary to decide whether, if the state had not parted with its title, it could have been disseised of a portion of the swamp lands. Here, as we have seen, the right of possession had passed to the holder of the certificate of purchase, in whom had vested a perfect equity, with an absolute right to demand a patent. Appellant cites in support of his position with respect to the trust certain adjudications which, as we think, do not support it. Emigrant Co. v. County of Adams, 100 U. S. 61, 25 L. Ed. 563, rather upholds the view that the power of reclaiming swamp and overflowed lands is in the state, without any other security that such lands will be reclaimed or that the proceeds of their sales will be applied to reclamation purposes than such as rests upon the good faith of the state; that the state may employ its discretion in the disposition of the proceeds, and providing means for reclamation, without being called on to account, and without the title

to the lands being affected, at least, at the option of any party other than the United States. It would follow from this, and from the wording of the act of Congress of September 28, 1850 (9 Stats. 519), that the state may dispose of the lands prior to their reclamation. There is no provision in the act of the legislature of April 21, 1858, to the effect that such lands shall not be sold or that no certificate of purchase or patent shall issue until after the lands are reclaimed. The state of California has provided, by appropriate legislation, for the reclamation of swamp and overflowed lands after the title of the state thereto had passed to private persons.

Kimball v. Reclamation, etc., 45 Cal. 344, is authority to the point that one who accepts a grant from the state for swamp lands is presumed to accept with a consent that he and his land shall be subject to subsequent legislation imposing a burden on the lands to secure their reclamation. The case assumes that such lands may be conveyed prior to their reclamation, and that the state may discharge its duty and comply with the condition subsequent imposed by the grant from the United States, by appropriate legislation, providing for reclaiming the lands after they have passed to private proprietorship. Appellant also cites Hoadley v. San Francisco, 50 Cal. 265. But in that case it was held that one cannot acquire a title by adverse possession to a public square or a public street—laid out and dedicated as such on pueblo lands within the limits of San Francisco—because the city had no power to alienate or in any manner dispose of such public squares or streets. With reference to the swamp and overflowed lands, the legislature of the state has power to grant them to private persons. As we have seen, the state had transferred the right of possession to the particular land herein sued for.

Judgment and order affirmed.

PACKARD v. JOHNSON.

No. 8550; November 27, 1885.

8 Pac. 823.

In bank.

By the COURT.—Upon the authority of Packard v. Moss, 68 Cal. 189, 8 Pac. 818, the judgment and order are affirmed.

HART v. WESTERN UNION TELEGRAPH CO.*

No. 9089; September 18, 1884.

4 Pac. 657.

Telegraph Companies—Limitation of Liability.—A Stipulation purporting to exempt a telegraph corporation from all liability for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, is void for want of consideration to support it.

Telegraph Company—Stipulation Against Liability—Presumption of Negligence.—It is not competent for telegraph companies to stipulate against or limit their liability for mistakes happening in consequence of their own fault; such as want of proper skill or ordinary care on the part of their operators, or the use of defective instruments. They are exempt only for errors arising from causes beyond their control; and whether such error was caused by negligence or was beyond their control is a question for the jury, the presumption being that it occurred through negligence.

APPEAL from the Superior Court of San Joaquin County.

W. H. L. Barnes for appellant; Byers & Elliot for respondent.

ROSS, J.—On the fifteenth day of December, 1882, the plaintiff delivered to the defendant, at its Stockton office, this message: "George W. McNear, San Francisco: Buy bail barley falun; report by mail. George Hart." The message was promptly transmitted and delivered as written, except that the word "bail" was changed to the word "bain." By the private cipher code of McNear, used by the plaintiff in the message, the word "bail" means "one hundred tons," and the word "bain" means "two hundred and twenty-five tons." As the message was delivered, it directed McNear to buy for the account of the plaintiff two hundred and twenty-five tons of barley, whereas, as it was written by the plaintiff, McNear was directed to buy on plaintiff's account one hundred tons only.

*For subsequent opinion in bank, see Hart v. Western Union Tel. Co., 66 Cal. 579, 56 Am. Rep. 119, 6 Pac. 637.

Acting on the message received, McNear bought for plaintiff two hundred tons of barley. When the plaintiff discovered that fact he notified the defendant that one hundred tons had been bought in excess of that directed to be bought by the original message, and asked the defendant what he should do with the surplus so purchased. Defendant refused to give any instruction in regard to it. Plaintiff thereupon sold the barley at the highest market rate, his loss on the extra one hundred tons being four hundred and twenty-nine dollars and eighty-two cents. It is for the loss thus sustained by him that the action is brought.

At the trial, the only proof given by the plaintiff to show negligence on the part of the defendant was the admitted fact that the message was delivered in its altered form. It was also admitted that the message was written by the plaintiff upon a printed form prepared by the defendant, underneath the words, "Send the following message, subject to the above terms, which are hereby agreed to"; and that among the "above terms" referred to are the following: "To guard against mistakes or delays the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery, of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruptions in the working of its lines, or for errors in cipher or obscure messages."

That the message in question was not "repeated" is conceded by the plaintiff. It further appears in the case that no explanation of the meaning of the dispatch was made by the plaintiff at the time he delivered it to the defendant, for which reason, and because, as is claimed, the message under consideration was in cipher, appellant contends that the measure of damages is the price paid for the transmission of the

telegram in this case—thirty cents. In support of this point it is said by counsel that "the decisions of all the courts uniformly declare that unless the importance of the message is shown, either by its own terms or by explanation made to the person receiving it in behalf of the telegraph company, no damages are recoverable for failure or delay in transmission beyond the price paid for that purpose." In this appellant's counsel is mistaken. The cases cited by him undoubtedly sustain the point he makes, and there are other cases to the same effect. Some of those decisions were based on messages which were in cipher, and others, messages which, though not in cipher, did not themselves disclose the extent or import of any transaction had in contemplation by the parties. In those cases substantial damages were refused because neither the messages nor other information given made known to the operator what was contemplated. Hence it was ruled that plaintiff could not recover of the telegraph company what, not understanding, it could not have contemplated as the effect of a miscarriage or other failure.

While not doubting the general rule that damages must be such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract—that is, such as might be naturally expected to follow its violation —we do question, and think not sound, the application of that rule as made in the class of cases to which allusion is above made. Telegraph companies have conferred upon them by law certain privileges, among them the right of eminent domain, and they are charged with certain duties, among them, the obligation to send promptly and correctly such messages as are intrusted to them. Of course, if illegibly written, the operator may reject a message, but if plainly written, his duty is to send it as written. Why has he the right to know what the message refers to? In what way would such knowledge aid him in the discharge of his duty to send it correctly? "One of the great attractions," says Scott and Jarnagin, in their treatise on the law of Telegraphs, section 404, "which this mode of communication presents is the brevity of the dispatch, such abbreviations being used in many cases as will enable the person for whom it is intended alone to understand it, and hence the vast amount of business the telegraph operator is capable of transacting in the transmission and delivery

of messages. So that an explanation of the meaning, importance and bearing of each message would be an insufferable annoyance, and, in the multiplicity of messages delivered for transmission, could not be remembered, even if the time could be spared to listen to it, and it would rarely afford any benefit or advantage to the company after the information was communicated." Proceeding, these writers say, and say correctly, that though the company, through its agents, may not know the meaning of the particular message, they do know that messages of great value and importance, involving heavy losses in case of failure or delay or mistake in their transmission, are constantly sent over the wires; and they do know that they hold themselves out to the public as prepared at all times and for all persons to transmit messages of this description. And the rule of damages as applied to telegraph companies is there deduced, which we think the true rule, namely, that, although the message be unintelligible to the company, yet, as its undertaking was to transmit the message promptly and correctly, both parties contemplated that whatever loss should naturally, and in the usual course of things, follow a violation of that obligation, the company should be responsible for. The same conclusion was reached by the supreme court of Alabama in the case entitled Daughtry v. Amer. U. Tel. Co. [75 Ala. 168, 51 Am. Rep. 435], decided in December, 1883, a note of which will be found at page 731, 46 Am. Rep., and by the court of appeals of Virginia in the case of Western Union Tel. Co. v. Reynolds, 77 Va. 173. See, also, Rittenhouse v. Independent Line of Telegraph, 1 Daly (N. Y.), 474.

It is also contended on behalf of the defendant corporation that, as the message in question was not "repeated," defendant is not responsible, under any circumstances, beyond the amount received for its transmission; and this because it is so declared in the conditions printed at the head of the form upon which the dispatch was written, and to which, as is claimed, the plaintiff assented. There are numerous cases that hold that such a rule on the part of the company is reasonable, valid and binding on the sender of the message. The cases that so hold are too numerous to be here referred to in detail. They will be found collated in a note to the case of Western Union Tel. Co. v. Blanchard, 45 Am. Rep. 486. But there are many cases to the contrary, and the latter

class we think based on the better reason. In the first place, we agree with the supreme court of Illinois in the case of Tyler v. Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 38, and S. C., 74 Ill. 170, 24 Am. Rep. 279, where it is held that the regulation requiring messages to be repeated is not a contract binding in law, for the reason that the law imposed upon the company duties to be performed, for the performance of which it was entitled to a compensation fixed by itself and which the sender had no choice but to pay; that among those duties was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and when the charges were paid the duty of the company began, and there was, therefore, no consideration for the supposed contract requiring the sender to repeat the message at an additional cost of fifty per cent of the original charge. To the same effect is Bartlett v. Western Union Tel. Co., 62 Me. 218, 16 Am. Rep. 437, and Candee v. Western Union Tel. Co., 34 Wis. 477, 17 Am. Rep. 452, where the court say:

"Aside from the objections resting on grounds of public policy, and which forbid the company from stipulating for immunity from the consequences of its own wrongful acts, it seems very clear to us that there can be no consideration for such stipulation on the part of the sender of the message, and that, so far as he is concerned, it is void for that reason, although exacted by the company and fully assented to by him. Either the company enters into a contract with him and takes upon itself the burden of some sort of legal obligation to send the message or it does not. It would be manifestly against reason, and what all must assume to be the intention of the parties, to say that no contract whatever is made between them, and nobody, not even the officers or representatives of the company, asserts such a doctrine. It would seem utterly absurd to assert it. Holding itself out as ready and willing and able to perform the service for whosoever comes and pays the consideration itself had fixed and declared to be sufficient, and actually receiving such consideration, it cannot be denied, we think, that a legal obligation arises and duty exists on the part of the company to transmit the message with reasonable care and diligence, according to the request of the sender. Such being the attitude of the company,

and the obligation which it assumes by accepting the payment, the question arising is whether it can at the same time, and as a part of the very act of creating the obligation, exact and receive from the other party to the contract a release from it. The regulations under consideration, if looked upon as reasonable and valid, completely nullify the contract by absolving the company from all obligation to perform it, and the party delivering the message gets nothing in return for the price of transmission paid by him. Is it possible for the company, or for any other party entering into a contract for a valuable consideration received, to promise and not to promise, or to create and not to create, an obligation or duty at one and the same moment and by one and the same act? The inconsistency and impossibility of such things are obvious. But if there were no such difficulties, or if the occasion or circumstances were such that a valid release might be executed, and it be regarded in that light, still the objection exists that there is no consideration whatever to support it, and it must be held void on that ground. If it be urged that the sender receives his consideration in the reduced price of transmission, or because the company undertakes to send the message at one-half the usual rates of transmitting day messages, that argument ends in proving that the company does not undertake to send the message at all, and that no contract or agreement on its part is made or entered into for that purpose. If the company promises or binds itself at all for the rate or consideration named, and which it is willing to and does accept, then the smallness of such consideration cannot operate to relieve from the promise or to destroy the obligation thus created. Regarding the regulations in this light, therefore, as well as in that of correct public policy, it is seen that effect cannot be given to them as a means of protection or escape on the part of the company from all liability for the performance of its contract. The regulations cannot serve to shield the company from the consequences resulting from the gross negligence or fraud of its officers or agents, or from their entire failure to perform the service, no good excuse for such failure being offered or shown."

We therefore hold that the stipulation purporting to exempt the corporation defendant from all liability for mistakes or delays in the transmission or delivery or for nondelivery of

any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, is void for want of a consideration to support it. And further, that it is not competent for telegraph companies to stipulate against or limit their liability for mistakes happening in consequence of their own fault, such as want of proper skill or ordinary care on the part of their operators or the use of defective instruments: See authorities above cited, and Sweatland v. Ill. & Miss. Tel. Co., 27 Iowa, 433, 1 Am. Rep. 285; Wolf v. Western Union Tel. Co., 62 Pa. 83, 1 Am. Rep. 387; Breese v. U. S. T. Co., 48 N. Y. 132, 8 Am. Rep. 526; U. S. Tel. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519; Western Union Tel. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744; Hibbard v. Western Union Tel. Co., 33 Wis. 558, 14 Am. Rep. 775; Tel. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500. We think the true rule is that such companies are exempt only for errors arising from causes beyond their own control. And this would seem to be the rule adopted by statute in this state; for by section 2162 of the Civil Code it is declared: "A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages. A carrier by telegraph must use the utmost diligence therein."

We are further of opinion that, the plaintiff having proved the mistake in the message as delivered, the onus was upon the defendant to show how it occurred: Tyler v. Western Union Tel. Co., supra. If the error was caused by atmospheric disturbances, or a momentary displacement of the wires, the defendant knew it, and ought to show it. This, defendant undertook to do on the trial in the court below. There was testimony given tending to show that before and at the time the message in question was sent, trouble was experienced in the transmission of dispatches, owing to the condition of the weather; that it was foggy and stormy. It was further made to appear that in the telegraphic code the following lines and dots, when transmitted along the wire, made the word "bail":

—- - - - — - - —

And that the word "bain" is expressed by the following:

—- - - - — - - — -

There was also testimony tending to show that the operators at Stockton and San Francisco were competent, and that

the one at San Francisco was especially careful in the matter of this dispatch. The latter testified that she took particular pains with the message in question, "as is shown by the mark under one of the cipher words,—the last word—because it was an unusual word—'falun.' I asked Mr. Dixon to repeat it, and I put a little mark, '+,' under it to show that it was repeated. The other words, being ordinary words, I paid no attention to, because it is something very likely to be received in any message." There was also given on behalf of the defendant further testimony tending to show that the error resulting in the change of the word "bail" to "bain" was caused by a break in the electric current, and that this in turn was caused by atmospheric influences prevailing at the time, and, of course, beyond the control of defendant. If such was the fact, the verdict should have been for the defendant. But it was a question of fact for the jury, under appropriate instructions from the court. The court should have told the jury that the mistake in the message as delivered, being admitted, the presumption was that it occurred through the negligence of defendant; but that if they believed from the evidence that the mistake occurred through a cause or causes beyond defendant's control, such as a break in the electric current produced by atmospheric influences, their verdict should be for the defendant. We think this question, which was the turning one in the case, was not fairly submitted to the jury in the court below, and we must therefore remand the cause for a new trial.

Judgment and order reversed and cause remanded for a new trial.

We concur: McKinstry, J.; McKee, J.

PEOPLE v. CARLETON.

No. 20,012; October 2, 1884.

4 Pac. 763.

Burglary.—Evidence Held Insufficient to justify the verdict.

Criminal Law.—Where the Charge, Taken as a Whole, is as Favorable as the circumstances required, the judgment will not be disturbed.

Criminal Law—Examination of Defendant as Witness.—Where questions put to the defendant when on the witness-stand elicited only favorable answers, and no attempt was made to contradict him, he could not have been prejudiced by such examination.

APPEAL from the Superior Court of the County of Santa Clara.

Defendant in this case was charged with burglary, and after trial convicted. An appeal from the judgment of the trial court was taken on the grounds stated in the opinion.

Lamar & Layson for appellant; J. H. Campbell for respondent.

By the COURT.—We think the evidence sufficient to justify the verdict. The charge, as a whole, seems to have been as favorable to the defendant as the circumstances required. The defendant's case could not have been prejudiced by the questions put to him, when on the witness-stand, by the district attorney. The answers were all favorable to the defendant, and no attempt was made to contradict him.

Judgment and order affirmed.

PEOPLE v. WONG CHOW.

No. 10,998; October 3, 1884.

4 Pac. 763.

Instructions.—Where the Evidence Warrants an Instruction Suggesting a Theory not presented by any other instructions given, it is the duty of the court to give the same at the request of one of the parties.

APPEAL from the Superior Court of the City and County of San Francisco.

The defendant was charged with assault with intent to commit rape. The usual instructions defining the crime, etc., were given. The defense then requested the court to instruct the jury that if defendant did not intend or attempt to have carnal intercourse with the child, but simply placed himself in close proximity to her for the purpose of satisfying his depraved taste, the offense did not constitute an assault with intent to commit rape. The instruction was refused. Defendant appealed.

T. H. Riordan for appellant; Attorney General Marshall for respondent.

By the COURT.—The eleventh instruction which the defendant requested to be given, and the court refused to give, to the jury, suggested a theory of the case which was not suggested by any of the instructions given, and we think the court erred in refusing to give it. The evidence, in our opinion, entitled the defendant to have that instruction given.

Judgment and order reversed, and cause remanded for a new trial.

PEOPLE v. ABBOTT.

No. 10,965; October 6, 1884.

4 Pac. 769.

Jurors—Exception to Allowance of Challenge.—No exception can be taken to the decision of a court allowing a challenge. A person summoned as a juror, who entertains conscientious scruples against finding a man guilty of a crime for which he would be hung, must neither be permitted nor compelled to serve as a juror.

Dying Declarations.—**Declarations Made by Deceased Held** to have been made under a sense of impending death, and therefore admissible as dying declarations.[1]

Confessions.—**Evidence of Confessions Made by a Defendant While Under Arrest** are admissible, if voluntarily made, the fact that defendant was under arrest not necessarily proving that the declarations were involuntary.

Criminal Law—Evidence.—**The Conduct, Acts, and Expressions** of a person accused of crime, at the time of his arrest, are admissible against him.

Criminal Law.—**Former Conviction of Felony may be Shown** by the examination of the witness, or by record of the judgment, and questions asked of the defendant, when testifying on his own behalf, as to such fact, are proper.

Homicide.—**Instructions on the Law of Murder and Malice,** in the language of sections 187, 188 of the Penal Code, are sufficient.

Homicide—Unlawful Act—Presumption.—When an act is proved to have been done by the accused, if it be an act in itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this presumption.

Dying Declarations—Jury to Judge Credibility.—Where dying declarations have been admitted as evidence, the question of their credibility comes within the province of the jury, and they are to give to them such credit as, on the whole, they may think them entitled to.

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1 **Cited** in note to Ann. Cas. 1912C, 436, in connection with State v. Crean, 43 Mont. 47, 114 Pac. 603, which case holds that the prosecution may avail itself of any evidence to show that at the time he made the declaration the deceased knew he was in extremis.

Cited with approval in Medina v. State, 43 Tex. Cr. 53, 63 S. W. 332, where it was held that a dying declaration is admissible to show all the facts immediately connected with the homicide to which a witness, were he present, could testify.

APPEAL from the Superior Court of the City and County of San Francisco.

John D. Whaley for appellant; the Attorney General for respondent.

McKEE, J.—The defendant having been convicted of murder in the first degree, and sentenced to imprisonment for life, appeals from the judgment, and an order denying a motion for a new trial.

1. In impaneling the trial jury the court allowed certain challenges, taken by the district attorney, to two of the panel of jurors, for implied bias, upon the ground that each of them entertained such conscientious scruples as would preclude him from finding the defendant guilty. The challenges were made upon the testimony of the jurors given during their examination as to their qualifications to sit as trial jurors. When taken, the defendant's counsel "denied the facts"; and the court, upon the testimony of the jurors previously given—none other having been offered after the denial of the facts—allowed the challenges and excluded the jurors. It is contended that the allowance of the challenges was erroneous, because there was no trial of the issue raised by the denial, and because the testimony of the jurors was insufficient. Section 1078 of the Penal Code provides: "If the facts are denied, the challenge must be tried by the court." But there was substantially a trial. The testimony of the jurors was taken before the judge himself, and the question raised by the denial of the defendant was submitted to the court for decision upon that testimony; for, after the denial of the facts, the defendant did not re-examine the jurors, nor offer any additional testimony; and as the question was practically submitted, by counsel for the people and for the defendant, upon the testimony before the court, the court had the right to, as it did, decide it without requiring the jurors to repeat themselves. The decision rendered was sustained by the evidence; for one of the jurors answered, substantially, that in a clear case of willful and deliberate murder he would be, as a juror, in favor of imprisonment for life, but opposed to hanging. And the other, that he had to a "certain extent" conscientious scruples against finding

a man guilty of a crime for which he would be hung. A person summoned as a juror, who entertains such conscientious opinions, must neither be permitted nor compelled to serve as a juror: Pen. Code, sec. 1074.

2. At the trial of the case the court admitted in evidence, as dying declarations, certain statements of the deceased. The statements were that the defendant, who was taken after his arrest to the bedside of the wounded man, was "the man who cut him with a knife, and that he had no cause for it whatever." It is contended that it was error to admit these statements, because it was not proved they were made under a sense of impending death. Dying declarations are inadmissible unless the declarant believed that death was impending. If at the time of the declarations he has any expectation or hope of recovery, however slight it may have been, and though death ensued soon afterward, the declarations are inadmissible: 1 Greenleaf on Evidence, 184. Under that rule, we held, in Hodgdon's Case, 55 Cal. 72, 36 Am. Rep. 30, certain dying declarations inadmissible, because, while the declarant, at the time of making the declarations, expressed herself as believing she would die, yet she also expressed the thought that she might recover, and therefore she had not abandoned the hope of recovery. In Taylor's Case, 59 Cal. 640, there was nothing in the circumstances of the case, or the expressions of the declarant, to indicate that he thought death was inevitable.

In the case in hand the evidence showed that the deceased died on the 23d of May, 1883, of traumatic peritonitis, caused by a knife-wound inflicted by the defendant on the 20th of May, 1883. After receiving the wound, the deceased was taken to the receiving hospital. He suffered great pain. His medical attendant testified that such a wound was invariably fatal. And, although encouraged by those around him, the wounded man frequently expressed himself as follows: "I have got my death wound. I think I am going to die. I believe I am going to die from the wound"; and he requested his wife to be sent for so that he might at once settle his affairs. His wife came, and was with him every day till he died; and she testified that "he said he was afraid he would never recover." The circumstances of the dangerous nature and character of the wound, the physical condition of the wounded

man as shown by his sufferings, and of his mental condition, as indicated by his expressions, justified the inference drawn by the court that the declarant was conscious of impending death at the time of the declarations. The declarations were properly admitted in evidence: People v. Sanchez, 24 Cal. 17. Besides, the declarations were made in the presence of the defendant, who did not deny them, and the defendant had, before he was brought into the presence of the wounded man, confessed the truth of the fact contained in the declarations. The confession of the defendant and the declarations of the wounded man, made in the presence of the defendant, were made within two hours after the stabbing, and both were admissible as part of the res gestae. The confession was this: "I don't deny I cut the son of a bitch to kill him, and if he ain't dead, I hope he will die." It was objected that this confession was extorted from the defendant by force and threats, but the evidence shows it was voluntarily made at the time of his arrest, and before the officer had time to speak to him upon the subject, and when he did make it the officer cautioned him about volunteering any statement of that kind, as it would have to be repeated at his trial, to which he answered "he did not care." There was, therefore, no error in admitting the confession and declarations.

3. Nor was there any error in admitting evidence tending to prove that the defendant, immediately after making the confession, became turbulent in his conduct, resisted the officer, and refused to deliver up the knife with which he had done the stabbing for which he was arrested. The conduct, acts, and expressions of a person accused of crime, at the time of his arrest, are always admissible in evidence against him.

4. The questions asked by the district attorney on cross-examination of the defendant, who testified as a witness in his own behalf, were proper. Former conviction of a felony may be shown by the examination of the witness, or the record of the judgment: Code Civ. Proc., sec. 2051.

5. In the charge of the court we find no prejudicial error. The instructions are not contradictory. The law of murder and malice was correctly expounded in the language of sections 187, 188, Penal Code; and the court added: "In its legal sense malice does not mean mere hatred and ill-will, but

denotes an intent to do an unlawful act, without legal justification or excuse. . . . . When an unlawful killing is proved, malice will be presumed, and the burden of proof is on the defendant to show the absence or want of malice." Exception was taken to the last clause of the instruction. But the code (subdivisions 2, 3, section 1963, Code of Civil Procedure) declares that a person intends the ordinary consequence of his voluntary act, and that an unlawful act was done with an unlawful intent. And the effect of these statutory rules of evidence is that when the act is proved to have been done by the accused, if it be an act in itself unlawful, the law in the first instance presumes it to have been intended, and the proof of justification or excuse lies on the defendant to overcome this legal and natural presumption: People v. Harris, 29 Cal. 682.

6. The instructions to the jury upon the subject of the dying declarations, which had been admitted in evidence, were favorable to the defendant, and were properly given. After the admission of such evidence the question of its credibility remains for the consideration of the jury. It is their province to weigh all the circumstances under which the declarations were made, including those already proved to the judge, and to give to the declarations such credit as, upon the whole, they may think them entitled to: 1 Greenleaf on Evidence, pp. 185, 186.

Judgment and order affirmed.

I concur: Ross, J.

McKINSTRY, J., Concurring.—I concur in the judgment.

1. Appellant contends the court erred in allowing a challenge on the ground of implied bias to certain jurors. But no exception can be taken to the decision of the court allowing a challenge: Pen. Code, sec. 1170.

2. Appellant urges it was error on the part of the judge below to deny defendant's motion to examine other witnesses as to the condition of deceased at the time certain declarations, alleged to be dying declarations, were made. But the judge, being satisfied that the declarations were made when deceased was under a sense of impending death, was not required, upon the mere suggestion of defendant's counsel that other persons might know something of the condition

of deceased, to postpone further proceedings until they could be brought in for examination. If defendant had offered to prove by any named witness that deceased, when he made the declarations, was not or did not believe himself in extremis, the point now made would have been presented by the record.

3. It is insisted the evidence did not show that deceased had abandoned every hope of recovery when the declarations were made. But the evidence sustains the finding of the court in that regard.

4. The court did not err in admitting evidence of the fact that defendant remained silent when deceased said "that is the man who cut me," for his silence was some evidence that the statement was true. Nor in admitting evidence of defendant's declarations when he was arrested; the fact that he was under arrest not necessarily proving that the declarations were involuntary. Nor in permitting the prosecution to put in evidence the pocket-knife of defendant, even if it be admitted it was taken from him by force.

5. Appellant claims error in that the court overruled his objections to questions put to the witness James Brown, and in "compelling" the witness to answer them. The witness was asked, in effect, if he had been convicted of certain felonies under other names than Brown. The objections were that the evidence called for was incompetent, irrelevant, and immaterial. The witness did not decline to answer on the ground that his testimony would tend to degrade him, but answered voluntarily. The evidence was not irrelevant nor immaterial. It was not incompetent: Code Civ. Proc., sec. 2051.

6. There was no material error in the portions of the judge's charge referred to in appellant's points. Conceding the court erred, after having held that the deceased was thoroughly convinced of his impending dissolution, and admitted the declarations, in permitting the jury to reject the declarations, if they should believe deceased did not think he was dying, the error could not have prejudiced defendant, since the declarations were adverse to him.

Ex Parte FINLEY.

No. 20,033; October 11, 1884.

4 Pac. 881.

Habeas Corpus—Prisoner Properly in Custody.—A prisoner will not be discharged on habeas corpus where, from the return of the officer having him in custody, it appears that he is held under an information in due form charging him with forgery.

Application for discharge on habeas corpus.

C. B. Darwin for petitioner.

See Ex parte Finley, 66 Cal. 262, 5 Pac. 222.

MORRISON, C. J.—Petitioner prays to be discharged on habeas corpus. It appears from the return of the officer having the defendant in custody that he is held under an information charging him with forgery. I do not deem it a proper exercise of authority to discharge the defendant, under the circumstances of the case.

Writ dismissed and prisoner remanded.

DONAHUE v. MARIPOSA LAND & M. CO.*

No. 8263; October 15, 1884.

4 Pac. 881.

Appeal.—Where No Index is Prefixed to the Transcript, the court, under the rule, is authorized to dismiss the appeal.

APPEAL from the Superior Court of the City and County of San Francisco.

Heydenfeldt, Brumagim & McAllister & Bergin for appellant; Winans, Belknap & Godoy and Doyle, Barber, Galpin & Scripture for respondents.

*For subsequent opinion in bank, see Donohue v. Mariposa L. & M. Co., 66 Cal. 317, 5 Pac. 495.

By the COURT.—No index is prefixed to the transcript, which contains over eight thousand folios. Under the rule the court is authorized to dismiss the appeal, but the submission of the cause is set aside, with leave to appellants to prepare and print proper index, to be prefixed to each copy of transcript within ten days.

ALEXANDER v. MUNICIPAL COURT OF APPEALS.*

No. 7130; October 31, 1884.

4 Pac. 961.

Certiorari—Rehearing not Permissible After Judgment.—Certiorari cannot be used to review an error or irregularity committed in exercise of a court's jurisdiction. A rehearing after judgment, on a writ of review, cannot be had in the lower court. The question upon the return of the writ is whether the court, whose judgment is the subject matter of review, pursued its jurisdiction, and the judgment on that question is reviewable only on appeal.

Municipal Court of Appeals—Dismissal of Appeal.—A dismissal of an appeal from the justice's court, taken on questions of law and fact, by the municipal court of appeals of the city and county of San Francisco, after the cause has been placed on the calendar by stipulation of the parties, if the appellant fails to appear at the trial, although no notice of a motion to dismiss has been given, though irregular, is not reviewable on certiorari.[1]

*For subsequent opinion in bank, see Alexander v. Municipal Court of Appeals, 66 Cal. 387, 5 Pac. 675.

[1] Cited in Robin v. Pierce, 10 Cal. App. 736, 103 Pac. 772, and distinguished from a case where an appeal has been fully perfected, in which case the court says there is no warrant for dismissing the appeal on motion based on the alleged ground of failure to prosecute with diligence.

Cited in Robin v. Pierce, 10 Cal. App. 736, 103 Pac. 771, and explained there as making the power to dismiss, with costs and penalty, for failure to prosecute (under section 980 of the Code of Civil Procedure), apply only to cases wherein there was a failure technically to perfect the appeal.

Cited in Kraker v. Superior Court, 15 Cal. App. 653, 115 Pac. 664, and given there as authority for there being no duty imposed upon a defendant, appealing from a justice's decision, to bring the case on for trial, since in such cases the hearing on appeal is a trial de novo and the plaintiff the active party.

APPEAL from the Superior Court of the City and County of San Francisco.

R. P. Wright for appellant; J. Rothchild for respondent.

McKEE, J.—Appeal from a judgment in proceedings on a writ of review, affirming an order made by the late municipal court of appeals of the city and county of San Francisco, dismissing an appeal, and from an order setting aside an order granting a rehearing. The order dismissing the appeal was made by the municipal court of appeals in a case pending before it, on an appeal taken from the judgment of a justice's court on questions of both law and fact. While the case was there pending the parties stipulated in writing that it be placed on the calendar of the court for trial, and that was done; but on the calling of the case in its order on the calendar for trial, the appellant did not appear, and the court, upon motion of respondent, ordered that the appeal be dismissed for want of prosecution. That order was made and entered without proof of service of notice of the motion upon the appellant; and it is contended that the court exceeded its jurisdiction in making the order without proof of such service.

The contention is founded upon section 980, Code of Civil Procedure. That section, as it existed at the time of the proceedings which are called in question, provided: "Upon an appeal heard upon a statement of the case, the county court may review all orders affecting the judgment appealed from, and may set aside or confirm or modify any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial. When the action is tried anew, on appeal, the trial must be conducted, in all respects, as trials in the district court. The provisions of this code as to changing the place of trial, and all the provisions as to trials in the district court, are applicable to trials on appeal in the county court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the county court, after notice, may order the appeal to be dismissed," etc.

These provisions regulated the practice of the court in (1) cases where appeals were taken on questions of law alone;

(2) where appeals were taken on questions of both law and fact; and (3) where there was failure to prosecute the appeal, or unnecessary delay in bringing it to a hearing. The last case arose where an appellant failed to do any of the acts required by section 977, Code of Civil Procedure, in perfecting his appeal, or in causing the papers in the case to be transmitted and filed in the appellate court. For any omissions or unnecessary delay in the performance of the requisite acts, the respondent in the case was entitled, after notice to the appellant, to have the appeal dismissed. But, in the case under review, there was no failure to prosecute the appeal and no unnecessary delay in bringing it to a hearing; for the papers in the case were promptly transmitted to and filed in the appellate court, and the parties stipulated in writing that it should be heard as soon as it was reached in its order upon the calendar of the court. The appeal was, therefore, not one of the class of cases dismissible upon notice for failure to prosecute the appeal, or for unnecessary delay in bringing it to a hearing; it was an appeal ready to be heard and determined on the questions of both law and fact on which it had been taken. If heard on questions of law, the appellant was the actor; if on questions of fact, the plaintiff in the action, although respondent on the appeal, was the actor; and, when the case was called for trial, the burden of proof was upon him to make out his case, whether the appellant appear or did not appear. Regularly, therefore, the respondent, when the case was called for trial de novo, ought to have proceeded with the case and taken a judgment. Instead of taking that course he moved to dismiss the appeal. Assuming that that was an irregular proceeding, it did not affect the jurisdiction of the court over the appeal. In the exercise of its appellate jurisdiction the court had authority to hear and determine the motion to dismiss. The fact that the motion was made without notice to the nonappearing appellant was not jurisdictional. The decision of the motion without requiring proof of notice of the motion may have been error; but, if so, it was error within the jurisdiction of the court, and an error or irregularity committed in the exercise of jurisdiction is not reviewable on certiorari.

Therefore, the judgment on the writ of review, affirming the order of the municipal court, was correct; but the subsequent order granting a rehearing on the writ was incorrect, and it was proper for the superior court to set aside that order.

There is no such thing as a rehearing after judgment on a writ of review. The case is heard upon the return made to the writ; and the only question upon the return is whether the court, whose judgment or order is the subject matter of review, pursued its jurisdiction: Code Civ. Proc., sec. 1074. The judgment rendered on that question is reviewable only on appeal. Judgment and order affirmed.

We concur: Ross, J.; McKinstry, J.

PEOPLE v. LYLE.

No. 10,988; October 31, 1884.

4 Pac. 977.

Jurors—Misconduct in Criminal Trial.—The Legal Presumption is that jurors perform their duty, and that presumption is not overcome by proof of the mere fact that, during a trial which lasted over thirty days, two or three of the jurors, after the adjournment of the court for the day, drank a few glasses of liquor at the expense of the district attorney or that one of them took dinner at his house under circumstances rendering the act of invitation necessary, or took supper with counsel under similar circumstances. To set aside a verdict and grant a new trial on the ground of irregularities or misconduct of the jury, it must be either shown as a fact or presumed as a conclusion of law that injury resulted from such irregularity or misconduct, and where there has been no injury the verdict will not be disturbed.[1]

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[1] **Cited** in note to Ann. Cas. 1912B, 750, on furnishing refreshment to juror by successful party as ground for new trial.

Cited and explained in People v. Lee Chuck, 78 Cal. 335, 337, 20 Pac. 726, 727, in which it is held that the drinking of intoxicating liquors by a jury is sufficient to invalidate its verdict, without a showing that the drinking affected, or might have affected, the result.

New Trial.—Alleged Newly Discovered Evidence of a fact known at the trial as to a matter about which one of the witnesses testified is no ground for a new trial.

Appeal.—Where No Objection is Taken to Irregularities on the Trial, the matter cannot be raised on appeal.

APPEAL from the Superior Court of Contra Costa County.

Attorney General Marshall for respondent; Mills & Jones and E. J. Emmons for appellant.

McKEE, J.—Appeal from an order denying a motion for a new trial, and from a judgment of conviction of murder in the second degree. The motion was made upon statutory grounds, but the case itself has been argued and submitted mainly upon one of them, namely, misconduct of the jury by which a fair and due consideration of the case was prevented. The alleged misconduct consisted of certain acts committed during the progress of the trial by the district attorney, his associate counsel, and some of the jurors. The acts were: That during the trial the district attorney, at his expense, treated some of the jurors to intoxicating liquors; that he presented one of them with a bottle of bitters, entertained him at his house with a dinner, and after dinner escorted him homeward; and that during the trial he and his associate counsel, at their expense, entertained the same juror and also a witness in the case at an oyster supper at which liquors were drank.

The affidavits read on the hearing of the motion show: That the trial of the case lasted over a month, commencing on the 10th of December, 1883, and ending, with intermissions, on the 11th of January, 1884; that at each adjournment the jury were allowed to separate under the instructions of the court; that during the recesses and adjournments of the court it was the practice of counsel engaged in the trial of the case —as well those for the defense as those for the prosecution —jurors, and witnesses to "interchange courtesies" by treating and drinking with some of the jurors at the bars of saloons. Twice during the progress of the trial the district attorney treated two or three of the jurors. Once he invited to dinner one of them, who was at his house to get from him a bottle of bitters which he had promised the juror two

months before, and on another occasion the same juror took supper with the district attorney and his associate counsel, under circumstances which rendered his invitation to supper unavoidable, except by a violation of the law of social intercourse. The acts of drinking and the entertainments of the juror were all done in the recess or adjournments of the court, and at considerable intervals of time. On none of the occasions does it appear that there was any conversation between juror or jurors and counsel, or any of the persons present, about the case or the trial thereof, or the defendant, or anything in connection therewith. On the contrary, the affidavits clearly show that there was not a word spoken nor the slightest allusion made to the trial, or any of the parties connected with it, at either of the entertainments, or on the occasions of drinking at the bars of saloons. It may be conceded that acts of ordinary and neighborly kindness, or of hospitality, to jurors sitting in the trial of a case—especially one of a criminal nature—by attorneys engaged in the trial, are "more honored in the breach than the observance." The exercise of such acts during the progress of such a trial serves to place the parties performing them in a position capable of being injuriously interpreted by those who may be adversely interested in the trial, or who may be watching it from the standpoint of sympathy or feeling with the litigants, and in that way confidence in judicial proceedings may be affected; but in themselves, unaccompanied by words or circumstances tending to show improper motives, or that a bias might have been created in the minds of any of the jurors which injuriously affected the person against whom the verdict was rendered, they do not justify an inference that the jury were influenced by them in making up their verdict.

The legal presumption is that jurors perform their duty in accordance with the oath they have taken (People v. Williams, 24 Cal. 31), and that presumption is not overcome by proof of the mere fact that during a trial, which lasted over thirty days, two or three of the jurors, after the adjournment of the court for the day, drank a few glasses of liquor at the expense of the district attorney; that one of them partook of a dinner at the house of the same officer, under circumstances which rendered the act of invitation necessary; and of a supper at the hotel of his associate counsel, under like circum-

stances. Such acts, however improper or indiscreet, could not, in themselves, have affected the impartiality of any one of the jurors, or disqualified him from exercising his powers of reason and judgment; and they will not warrant a court in setting aside a verdict. "While the law," says Chief Justice Sharkey, "is rigidly vigilant in guarding and preserving the purity of jury trials, yet it will not, for light or trivial causes, impugn the integrity of juries, or question the solemnity and impartiality of verdicts": Hare v. State, 4 How. (Miss.) 187. It is the settled rule that to warrant the setting aside of a verdict and granting of a new trial, upon the ground of irregularities and misconduct of a jury, it must be either shown as a fact, or presumed as a conclusion of law, that injury resulted from such misconduct. When it is clear that the party against whom the verdict has been found was not injured by the misconduct, the verdict will not be disturbed.

There is nothing in People v. Gray, 61 Cal. 164, 44 Am. Rep. 549, which conflicts with this conclusion. In that case the jury had, during the trial, drank freely, if not grossly, of liquors procured by themselves. Upon the submission of the case to them for their deliberation some of them took bottles of whisky with them into the jury-room, and there was evidence tending to show that one of them, while deliberating on the verdict, drank so much as to unfit him for the proper discharge of duty. There is no doubt that the actual drunkenness of a juror will always vitiate a verdict. But here there is no showing that any juror was under the influence of liquor while on duty, or that any liquor was drank at any time while on duty; and there is nothing in the acts charged from which the court could reasonably infer that they, in the slightest degree, influenced the result.

There is no basis for the charge that the sheriff improperly spoke to one of the jurors about the evidence in the case. The alleged newly discovered evidence of a fact known at the trial, as to a matter about which one of the witnesses testified, is no ground for a new trial. No diligence is shown for not using the fact as evidence. Besides, it merely tended to impeach the evidence of the witness on a former trial; and a new trial is not grantable for merely impeaching evidence. There was no objection taken to the alleged transgression of

the district attorney in the argument of the case. The court itself interposed to stop it, and the attorney desisted. There was no error in the charge of the court. Judgment and order affirmed.

We concur in the judgment, and in the conclusion reached in the foregoing opinion: McKinstry, J.; Ross, J.

CHAFFEY v. DEXTER.

No. 9695; November 1, 1884.

4 Pac. 980.

Attorney and Client—Compromise—Findings.—Where the matter of a compromise was talked over between a client and his attorney, and the attorney did compromise on the terms which he supposed his client assented to, a finding is justified that the client authorized his attorney to compromise as he did.[1]

Attorney and Client—Compromise—Appeal.—Whether an attorney correctly understood his client, regarding his desires as to a compromise, is a question dependent on the weight of evidence, and, the question being in doubt, the finding of the lower court will not be disturbed.

APPEAL from the Superior Court of San Bernardino County.

H. M. Willis for appellants; Paris & Goodcell for respondent.

SHARPSTEIN, J.—The plaintiffs, George and William B. Chaffey and the Pomona Land & Water Company, brought an action against the defendant for the diversion of a large portion of the water of San Antonio creek, which flows over the plaintiffs' lands. The defendant denied the material allegations of the complaint, and alleged that he was the owner

[1] Cited in note to Gibson v. Nelson (111 Minn. 183, 126 N. W. 731), in 31 L. R. A., N. S., 530, where there is under consideration the proof required of the attorney's authority from his client to compromise the case.

of the exclusive right to use and control forty inches, measured under a four-inch pressure, of the water of said stream for the purpose of irrigation, etc. The answer was filed on the 15th of October, 1883. On the 12th of February, 1884, a judgment was entered in accordance with a written stipulation of the attorneys of the several parties, by which it was adjudged and decreed that the plaintiffs were entitled to the use and control of all the water flowing in said creek, with the exception of twenty inches, measured under a four-inch pressure, which the defendant was entitled to use and control. On the 28th of March, 1884, plaintiffs' attorney gave defendant's attorney notice that the plaintiffs would move the court that said stipulation, and said judgment entered in pursuance thereof, be set aside, "on the ground that the said stipulation was made under mistake, inadvertence, and excusable neglect of attorney of plaintiffs, H. M. Willis, and without any authority on his part, and upon representations upon which he relied, made by one Touner, attorney for the Pomona Land & Water Company, one of the plaintiffs"; and that the motion would be made on the papers in the case and upon affidavits.

By the affidavit of Mr. Willis it appears that, at some time intermediate the date of the commencement of the action and the entry of the judgment, he had a conversation with the plaintiff George Chaffey, Jr., in regard to a compromise of the action on the terms as he (Willis) understood, expressed in the stipulation which he subsequently entered into with the defendant's attorney. We refer to the following clause in said affidavit:

"That in a previous conversation with his client, George Chaffey, Jr., the proposition of allowing twenty inches of water to defendant was discussed between them, but deponent did not understand his client in the way said client, as he now informs him, intended to be understood, to wit, that they were willing to allow, as a compromise, the defendant to have the amount of a certain box or flume leading from said creek mentioned in the pleadings to defendant's farm—said box or flume containing about twenty inches of water—to be used by him (defendant) on his land exclusively adjacent to said stream, at stated periods, about once a week; that the deponent had no authority, in writing or verbal, from his

client in relation to said compromise, but acted solely in said matter on his understanding of his client's wishes, and upon representations made to him by said Tonner."

From this it appears that the matter of a compromise was talked over between the client and his attorney, and that the attorney did compromise on the very terms to which he supposed his client had assented. We think, upon this evidence, the court was justified in finding that the client authorized his attorney to compromise as he did. Whether the attorney correctly understood his client is a question which is left in doubt, and that being so we cannot disturb the order of the court below. The attorney undoubtedly acted according to his understanding of his client's wishes as expressed by the client himself. Order affirmed.

We concur: Thornton, J.; Myrick, J.

CARTER v. ALLEN.

No. 8377; November 14, 1884.

4 Pac. 1064.

New Trial—Statement of the Case—Error not Specified.—Where a motion for a new trial was made on a statement of the case, no alleged error of law can be considered unless it is specified in the statement.

Evidence—Findings.—Evidence Held to Sustain the findings.

APPEAL from the Superior Court of the City and County of San Francisco.

Tully R. Wise for appellant; Stanley, Stoney & Hayes for respondents.

By the COURT.—The motion for a new trial was made on a statement of the case, and we cannot consider any alleged error of law unless it is specified in the statement; and the ruling of the court on the defendants' offer "to show that the money in the hands of the administrator had come to his

hands during the existence of the first bond'' is not specified as one of the particular errors upon which the defendants would rely. If the finding that the administrator received, after the bond on which the action is based was executed, a sufficient sum of money to satisfy the plaintiff's demand, was justified by the evidence, the question whether the sureties would be liable if their principal had not had, at any time after the date of the bond, any money in his hands belonging to the estate, does not rise in this case. The evidence, as we read it, justifies that finding. We think the rulings of the court on the objections to the introduction of the orders of the probate court and the judgment-roll admitted in evidence were correct.

Judgment and order affirmed.

SHARP v. MILLER.

No. 7612; November 14, 1884.

4 Pac. 1065.

Appeal—Order Made After Reversal of Judgment.—The reversal of a judgment and order denying a motion for a new trial, on appeal, places the parties in the lower court in the same position as if the cause had never been tried (except that the opinion of the appellate court must be followed as far as applicable in the new trial); there is no existing judgment, and an order made after such reversal is not an order made after final judgment, nor appealable as such.

APPEAL from the Superior Court of the City and County of San Francisco.

P. B. Ladd for appellant; G. F. & W. H. Sharp for respondent.

By the COURT.—The order appealed from in this case is not appealable. The appellant contends that it is a special order made after final judgment. The judgment formerly rendered was reversed, and there was no judgment in the

cause when the order appealed from was made. The reversal of the judgment and order denying the motion for a new trial when the cause was here before (see 54 Cal. 329) placed the parties in the lower court in the same position as if the case had never been tried, with the exception that the opinion of this court must be followed so far as applicable in the new trial: Stearns v. Aguirre, 7 Cal. 447.

Appeal dismissed.

JOHNSON, Executor, etc., v. HANCOCK and Others.

No. 9339; November 18, 1884.

4 Pac. 1093.

Ejectment—New Trial—Judicial Discretion.—Where, in an action of ejectment, it was clearly established that plaintiff had possessory title, and that the withholding by defendants was unlawful, and judgment went for defendants, it is a proper case for granting a new trial, and the court in doing so does not abuse its discretion.

APPEAL from the Superior Court of San Diego County.

O. W. Paine and Work & Titus for appellants; Will M. Smith for respondent.

By the COURT.—The plaintiff commenced an action of ejectment for certain lands described in the complaint, situate in the county of San Diego. Defendants had judgment, and the court granted plaintiff's motion for a new trial. This appeal is by defendants from the order of the court below granting the motion for a new trial. The evidence in the case clearly established plaintiff's title—possessory title, at least—to the land in controversy, and the unlawful withholding thereof by the defendants, the appellants. The occupancy and cultivation of the land, as well as an actual residence thereon, by plaintiff's testatrix, and the subsequent entry thereon by the defendants, all affirmatively appear in the evidence. It was with license, too, of the plaintiff, and under a full recognition of his right to the possession, that

the defendants made the first entry upon the premises in controversy, and, after having surrendered the possession thereof, they made a second entry, which was without license, and wrongful, for the avowed purpose of holding the possession until a certain claim or money demand made by Hancock's daughter was satisfied.

We think it was a proper case for a new trial, and there was no abuse of discretion in granting the same. This court will not presume error: Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318.

Order affirmed.

DORE v. DOUGHERTY.*

No. 9683; November 19, 1884.

4 Pac. 1067.

Appeal.—An Appeal is Dismissable for Some Irregularities in taking it, for failure to prosecute, for want of appearance, or on consent of parties; but where it has been perfected according to law and the appellant appears, he is entitled to be heard upon any question of fact involved in the merits. Because the proposed statement on motion for a new trial was not served upon a certain one of the adverse parties is not ground for dismissal of the appeal.

APPEAL from the Superior Court of the City and County of San Francisco.

J. M. & C. E. Nougues for appellant; Mich. Mullany and Firebaugh & Bates for respondent.

McKEE, J.—The respondent moves to dismiss the appeal taken from the order denying a motion for a new trial in this case, principally upon the ground that the transcript shows on its face that the proposed statement on the motion was not served upon one of the "adverse parties," as required by subdivision 3, section 659, Code of Civil Procedure.

*For subsequent opinion, see 72 Cal. 232, 1 Am. St. Rep. 48, 13 Pac. 621.

It is conceded that the proposed statement was served on all the parties except one, viz., the defendant Hallidie. Upon him it was not served; but the court, as to the parties upon whom it was served, settled and allowed the same, certified to its correctness, and upon it, as certified, the motion for a new trial was submitted and denied. It may be that the court denied the motion because the proposed statement had not been served upon all the parties. If that were so, or if it were not so, it is not cause for a dismissal of the appeal. An appeal is dismissible for some irregularities in taking it, or for failure to prosecute it, or for want of appearance, or for consent of parties; but where it has been perfected according to law, and the appellant appears, he is entitled to be heard upon any question or fact involved in the merits.

Motion denied.

We concur: Ross, J.; McKinstry, J.

MARTIN v. HILL and Others.

No. 7923; November 20, 1884.

4 Pac. 1101.

Contract.—Upon a Construction of the Agreement which is the subject of the suit, judgment affirmed.

APPEAL from the Superior Court of the County of Marin.

E. S. Lippitt for appellant; A. W. Thompson for respondents.

ROSS, J.—Each of the parties to the agreement we are called upon to construe in this case was, at the time of its execution, in possession of a distinct portion of the Bojorques rancho, for the partition of which rancho an action of partition, entitled Gates v. Salmon et al., was then pending in one of the district courts of the state. Some of the parties to the agreement were holding under deeds from tenants in common of the rancho, purporting to convey the distinct par-

cels so possessed, and others of them were holding under deeds from tenants in common of the rancho, purporting to convey an undivided interest therein. The purpose of the agreement in question was to secure to the respective parties to it the portions of the rancho of which they were respectively in possession; and, lest it should turn out in the partition that their respective interests should not be sufficient to cover their respective possessions, it was determined to purchase, in the name of certain trustees, other and sufficient undivided interests in the rancho to carry out the wishes of the parties. The money required for such purchases was to be contributed by the parties to the agreement in proportion to the number of acres and value of the land included within their respective possessions. All is embodied in the agreement, as we read it. Omitting some of its contents not necessary to be stated, the agreement then proceeds:

"And it is further agreed that the title so acquired shall be used for and devoted to the purpose of quieting title to the said lands so in possession severally of the parties hereto, and for this purpose, and for all purposes under this agreement, it is stipulated that the parties hereto, known as claimants by 'special location,' shall be deemed and admitted to be, respectively, the owners in fee simple of the tracts of land described in their respective deeds under said special location, and that, for any lands in their possession not included within the lands described in their said deeds, they, and each of them, may purchase of the parties hereto, acting jointly as aforesaid, such title as may be requisite for their protection in and acquirement of title to the said lands, outside of the special locations or not included within said descriptions in the deeds, and the price to be paid therefor shall be at the rate per acre that the title by them so bought has cost in the original purchase of undivided interests in the whole rancho—the number of acres pertaining to the undivided interests so bought to be ascertained from the report of the commissioners in partition, without reduction by reason of special locations. And the parties claiming as tenants in common shall also have the privilege of buying in the same manner and at the same price as last above provided, whatever number of acres they may have in possession in excess of their present undivided interest in said rancho, as shown

by the report and survey of said commissioners in partition. And it is further agreed that all property, advantages, and profits derived from purchases made under this agreement shall belong to the parties hereto in proportion to their several contributions, and that none of the provisions of this agreement shall inure to, or in any way protect, any person not a party to these presents."

The plaintiff, who was a party to this agreement, was, at the time of its execution, the owner of an undivided interest in the rancho, and was in the possession of that portion thereof involved in the present action. He derived his undivided interest from one Walker, pending the partition suit, Walker retaining other interests therein. Subsequent to the agreement, and pending the partition action, the trustees named purchased certain undivided interests in the rancho for the purpose contemplated by the agreement, the money with which the purchases were made being contributed by the respective parties to the agreement in proportion to the number of acres and the value of the land embraced in their respective possessions. The plaintiff was not made a party to the action of partition after his purchase from Walker of an undivided interest in the rancho, but with respect to that interest the action was continued in the name of Walker; and in the final decree of partition there was awarded to Walker a portion of the rancho equivalent to the undivided interest conveyed by him to the present plaintiff, and to the undivided interest retained by him after that conveyance. The portion of the rancho so awarded to Walker did not include any portion of the tract actually possessed by this plaintiff, but the tract actually possessed by the plaintiff was, in and by the final decree in the action of partition, awarded to the trustees named in the agreement in question in lieu of the undivided interest in the rancho purchased by them pending the action of partition under and by virtue of the agreement, and with money contributed in accordance with its provisions. And the plaintiff brings this action to compel the assignee (with notice) of the trustees to convey to him the title to the portion of the rancho actually possessed by him at the time of the execution of the agreement, upon the payment by him, which he tenders, of a price at the rate per acre paid by the trus-

tees in their purchase of the undivided interests, in pursuance of the provisions of the contract.

It will be seen, therefore, that the case turns upon the construction to be placed on the agreement in question, the most material part of which has been hereinbefore quoted. If, under that agreement, the plaintiff could permit the undivided interest which he held in the rancho at the time of the execution of the agreement to be set off in the name of his grantor so as not to include any part of the land in his actual possession, and then claim to purchase the whole of the land so actually possessed by him from the trustees under the agreement, then the plaintiff should recover in the action. If, on the other hand, the purpose of the agreement was to enable plaintiff to obtain the title to such portion of the land actually possessed by him as his individual interest might prove insufficient to cover, then he should not succeed in the present suit. The latter we think the true construction of the agreement, and the judgment and order are therefore affirmed.

We concur: Sharpstein, J.; McKinstry, J.

I concur in the judgment: McKee, J.

I dissent: Thornton, J.

KELLEHER v. KENNEY.

No. 8297; November 21, 1884.

4 Pac. 1095.

New Trial—Newly Discovered Evidence—Materiality—Reversal.—If alleged newly discovered evidence is merely cumulative, and every material fact is contradicted by counter-affidavits, and an appellate court cannot clearly say that the court below erred in refusing it, the order refusing it will not be reversed.

APPEAL from the Superior Court of the City and County of San Francisco.

P. G. Galpin for appellant; Pillsbury & Titus for respondent.

By the COURT.—Plaintiff moved for a new trial on newly discovered evidence. Affidavits and counter-affidavits were filed. We are not informed, except by the certificate of the clerk, that the affidavits were used on the motion; but, no point being made thereon, we pass to the point presented. The evidence set forth in the affidavits of plaintiff was clearly cumulative. It was in effect denied by the counter-affidavits. The real issue on the trial of the case was whether plaintiff's intestate had delivered to defendants certificates for the six hundred shares of stock in dispute, not whether they were delivered on the 10th of December, 1877, or on or about the 10th of January, 1878. The date of the delivery was not the material fact. If the alleged newly discovered evidence is merely cumulative, and every material fact is contradicted by counter-affidavits, and the appellate court cannot clearly say that the court below erred in refusing it, the order refusing it will not be reversed: Doyle v. Sturla, 38 Cal. 456. See, also, People v. McCauley, 45 Cal. 146.

Order affirmed.

PELLIER v. GILLESPIE and Others.

No. 7790; November 22, 1884.

4 Pac. 1137.

Process.—An Affidavit of Service of Summons is not Fatally Defective because it does not state that the parties on whom it was served were residents of the county where served. If it states that they were served in that county, it will be presumed, nothing to the contrary appearing, that they resided in the county in which they were served with process.

Mortgage—Foreclosure.—An Allegation That a Purchaser of Mortgaged Property covenanted and agreed to pay the mortgage debt and discharge the mortgage lien is sufficient to sustain the judgment of foreclosure and sale.

APPEAL from the Superior Court of Santa Clara County.

This was a proceeding to foreclose the plaintiff's mortgage on defendant Gillespie's premises. The complaint alleged

sale by Gillespie to the defendant the San Jose I. M. & L. Co., and that said company had covenanted and agreed with Gillespie to pay the mortgage debt and discharge the mortgage lien. The court rendered a judgment of foreclosure and decree of sale. The defendant San Jose I. M. & L. Co. appealed.

Houghton & Stetson for appellant; J. R. Lowe for respondent.

By the COURT.—The objection that the affidavit of service of summons is fatally defective because it does not state that the appellant, on whom the summons alone was served, and the defendant, on whom a copy of the complaint was served with the summons, were residents of the same county, is overruled, on the authority of Calderwood v. Brooks, 28 Cal. 153. The allegation that appellant covenanted and agreed to pay the mortgage debt and discharge the mortgage lien is sufficient to sustain the judgment. There is a sufficient description of the premises. Judgment affirmed.

DUNPHY v. THE POTRERO CO. and Others.

No. 7067; November 28, 1884.

4 Pac. 1171.

Appeal.—A Person cannot Appeal from a Judgment Who is not a Party nor privy thereto, nor injured thereby.

APPEAL from the Superior Court of the City and County of San Francisco.

T. J. Crowley and A. Campbell, Jr., for appellant; John A. Stanley for respondents.

By the COURT.—This appeal is by Laura A. Mowrie from a judgment rendered in favor of the plaintiff against the following named defendants, viz.: The Potrero Company, L. A.

Lowrie, John Edwards, Ah Wing, Ah Wun, and Henry F. Williams. The appellant was not a party nor privy to, nor a person aggrieved by, the judgment; therefore her appeal must be dismissed. It is so ordered.

DYER v. HEYDENFELDT.

No. 7847; November 29, 1884.

4 Pac. 1187.

Streets—Order for Grading—Notice of Intention—Petition.—The statute of 1872 authorized the board of supervisors of the city and county of San Francisco, on recommendation of the street superintendent, to give notice of their intention to order that Broadway, from the west line of Buchanan to the west line of Webster street, be graded, when two blocks on each side of said portion of Broadway had been graded, without any petition for such order.

Streets—Grading—Recommendation of Street Superintendent.—Where the matter was not at issue, and neither party introduced any evidence thereon, it was erroneous for the court to find that such street work was ordered without the recommendation of the superintendent of streets.

Streets.—A Dismissal, in a Street Assessment Suit, as to defendants not having any interest in the land assessed, is not error prejudicial to other defendants.

APPEAL from the Superior Court of the City and County of San Francisco.

J. M. Wood for appellant; Bishop & Fifield for respondent.

By the COURT.—The court found that before the board of supervisors gave notice of their intention to order that Broadway, from the west line of Buchanan street to the west line of Webster street, be graded, "two blocks upon each side of the above-mentioned portion of said Broadway street" had been graded. That being so, the board of supervisors were authorized, upon the recommendation of the superintendent of streets, etc., to give notice of their intention to order said grading without any petition therefor: Stats. 1872,

c. 562, sec. 4, p. 806. But the court also found that the work was not ordered upon the recommendation of said superintendent. This finding is attacked on the ground that there is no evidence to support it. It was unnecessary for the plaintiff to allege what proceedings had been had prior to the issuance of the assessment, diagram, and certificate (Id., sec. 13); and the defendant did not allege in his answer that the work was not ordered on the recommendation of said superintendent. In the absence of any such averment in the answer, the fact was not in issue. Neither party introduced any evidence which tended to prove or disprove that the superintendent had recommended that the work should be ordered. On this ground we think the motion for a new trial ought to have been granted.

It does not appear that any objection was made to the dismissal of the action as to all the defendants except the respondent. In Clark v. Porter, 53 Cal. 409, there was an objection to the dismissal of the action as to any of the defendants. It is found that none of the defendants as to whom the action was dismissed had any interest in the land assessed. That being so, the dismissal could not prejudice those as to whom the action was not dismissed. Judgment and order reversed.

GRANGE v. GOUGH.

No. 8446; December 2, 1884.

4 Pac. 1177.

Homestead—Of What Consists.—A homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as provided by the statute (Civil Code, sec. 1237).

Findings.—Evidence Held Sufficient to justify the findings.

APPEAL from the Superior Court of the City and County of San Francisco.

John Wade for appellant; E. F. Preston for respondent.

By the COURT.—The court found that the demanded premises were never at any time the separate property of the defendant Margaret Gough, and that the defendants did not nor did either of them reside on said premises at the time of filing their declaration of homestead. A homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as provided in title 5 of the Civil Code: Civ. Code, sec. 1237.

We think the evidence, though conflicting, was sufficient to justify these findings. Judgment and order affirmed.

OAKLAND BANK OF SAVINGS v. APPELGARTH.*

No. 9636; December 2, 1884.

4 Pac. 1189.

Appeal.—Where Evidence is Conflicting, the judgment of the lower court will not be disturbed on appeal.

Tender—Objections—Waiver.—By the Statute (Code Civ. Proc., sec. 2076), it is provided that the person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the amount or the kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterward.

APPEAL from the Superior Court of Merced County.

J. K. Law for appellant; W. G. Goodfellow and E. Jackman for respondent.

MORRISON, C. J.—The plaintiff brought this suit to foreclose a mortgage on lands situate in Stanislaus county, and judgment was rendered for the defendant on the ground that the amount due on the mortgage debt was duly tendered before suit brought. The principal object in the case seemed to be the institution of a suit before the defendant could

*For subsequent opinion in bank, see Oakland Bank of Savings v. Appelgarth, 67 Cal. 86, 4 Pac. 1189.

make a legal tender of the amount due, and there seems to have been such a small interval of time between the tender and the filing of the complaint that it was scarcely appreciable. Why this anxiety to bring the suit before the defendant could make his tender is only to be accounted for by the fact that the plaintiff was desirous of collecting the percentage provided for in the mortgage to cover legal expenses. This mortgage had been sent to the attorney of the plaintiff at Merced, for foreclosure, before any steps looking toward a tender had been taken by the defendant; and the ascertainment of the fact that legal proceedings were about to be instituted probably stimulated the defendant to action, and prompted him to make the tender as speedily as possible. At all events, the testimony of the exact time when the tender was made, and that relating to the precise moment when the complaint was filed, was such as to raise a doubt which act was first in point of time. The court below found that the tender was first in point of time, and we are not prepared to say that such conclusion was not warranted by the evidence. On a disputed fact of this character the court would hardly strain a point to reach a different conclusion, and we are satisfied with that arrived at by the court below.

The third finding is, "that on the first day of September, A. D. 1882, at the hour of 2 P. M., and before the commencement of this action, defendants tendered to and offered to pay to plaintiff the sum of six thousand three hundred and thirty-four dollars and fifty-five cents in United States gold coin in payment and satisfaction of said note and mortgage; that plaintiff did not make or specify any objection to said sum of six thousand three hundred and thirty-four dollars and fifty-five cents, or to the amount thereof, nor did plaintiff specify any other as the amount which it required, but then and there refused, and ever since has refused, to accept from defendant said sum or any part thereof. The defendant has at all times been ready and willing to pay plaintiff said sum of six thousand three hundred and thirty-four dollars and fifty-five cents, and did, at the time of filing his answer therein, bring into court and deposit therein for plaintiff said sum so tendered to plaintiff as aforesaid."

By section 2076, Code of Civil Procedure, it is provided that "the person to whom a tender is made must, at the time,

specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterward."

Under the circumstances of this case, it was no great hardship for the plaintiff to be charged with the costs of the litigation, and we must affirm the judgment. Motion to dismiss the appeal denied. Judgment and order affirmed.

We concur: Myrick, J.; Ross, J.

In re TREADWELL.*

No. 9761; December 6, 1884.

4 Pac. 1192.

Attorney—Disbarment or Suspension.—Charges against an attorney at law, which, if proven, would not clearly constitute a cause for suspension or removal under the provisions of the code (Code Civ. Proc., sec. 287), will not be investigated on proceedings to remove him.

Proceedings for disbarment of an attorney.

A. C. Adams and W. C. Belcher for respondent.

By the COURT.—Without expressing any opinion upon the question whether this court could remove or suspend an attorney for causes other than those specified in section 287, Code of Civil Procedure, we have concluded in this case not to investigate the charges which, if proven, would not clearly constitute a cause for suspension or removal under the provisions of the code. Therefore, the objections to the charges growing out of respondent's transactions with the Bank of Woodland and with Adolph Heine and wife, or either of them,

*For subsequent opinion in bank, see In re Treadwell, 67 Cal. 353, 7 Pac. 724.

are sustained, and the specifications relating to said charges are ordered stricken out. And it is further ordered that the issue raised by respondent's plea of not guilty to the remaining charge be referred to A. P. Catlin, Esq., of Sacramento, to take testimony and report the same to this court with all convenient dispatch.

REYNOLDS v. ROBERTSON.

No. 8490; December 8, 1884.

4 Pac. 1192.

Judgment—Action on.—The Plea of Nul Tiel Record is a good defense to an action on a judgment.

APPEAL from the Superior Court of the City and County of San Francisco.

T. C. Van Ness for appellant; H. C. Firebaugh for respondent.

By the COURT.—The first defense set up in the answer of the defendant is substantially that of nul tiel record. Such a defense to an action on a judgment is a good one, and the court, therefore, erred in sustaining a demurrer to it. Judgment reversed, and cause remanded for a new trial.

DOOLAN and Others v. CUNNINGHAM, Administrator, etc.

No. 8280; December 8, 1884.

4 Pac. 1193.

Appeal.—The Use of the Word "Defendant" Instead of "Defendants" in conclusions of law, when clearly a clerical misprision, is not entitled to any regard on appeal.

APPEAL from the Superior Court of the City and County of San Francisco.

George W. Tyler for respondents; Cary & Troutt for respondents.

By the COURT.—We have examined the record in this case and find it without error. The use of the word "defendant" instead of "defendants," in the conclusions of law, is so clearly a mere clerical misprision that we do not think it entitled to any regard. Judgment affirmed.

GANAHL v. SOHER.*

No. 8441; December 9, 1884.

5 Pac. 80.

Statute of Limitations.—The Time Within Which a Minor may Assert His Rights, or commence an action for an interest in real property, is five years from the time of attaining his majority. The time of his minority is calculated from the first minute of the day on which he is born to the first minute of the day corresponding which completes the period of minority; and, in calculating the time within which he may thereafter bring such action, as he attains majority on the first minute of a day, the whole of that day is to be calculated as the first day of the five years within which he may bring the action.[1]

APPEAL from the Superior Court of the City and County of San Francisco.

Carter P. Pomeroy for appellant; Hy. J. Tilden for respondent.

ROSS, J.—The plaintiffs claim title to the lot of land in controversy as the heirs at law of Henry Ganahl, who died intestate, in the state of Georgia, on the twelfth day of May, 1855. That whatever rights, if any, the plaintiffs Maria Ann and Ann Elizabeth Ganahl acquired in the premises as such

*For subsequent opinion in bank, see Ganahl v. Soher, 68 Cal. 95, 8 Pac. 650.

1 **Cited** and followed in Ex parte Wood, 5 Cal. App. 473, 90 Pac. 962, where a commitment to the State Reform School of an alleged minor, on the sixteenth day of March, 1907, was held invalid, the person committed being a girl born on the seventeenth day of March, 1889.

heirs at law became barred by the provisions of the statute of limitations prior to the commencement of this action, admits of no question. The remaining plaintiff, Henry Gordon Ganahl, was born April 11, 1855. Sections 25 and 26 of the Civil Code of this state provide:

"Sec. 25. Minors are (1) males under twenty-one years of age; (2) females under eighteen years of age.

"Sec. 26. The periods specified in the preceding section must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority."

Under the rule prescribed by the section last quoted, Henry Gordon Ganahl became of age the first minute of the eleventh day of April, 1876, and by virtue of section 328 of the Code of Civil Procedure he was entitled to commence an action for the recovery of whatever interest he had in the land within the period of five years thereafter, but not after the expiration of that period. In computing the period of five years we must include the eleventh day of April, 1876, because, as the plaintiff in question attained his majority the first minute of that day, he had the whole of the day in which to sue; and computing that as the first day of the five years, the whole period of five years expired with the tenth day of April, 1881, and the action not having been commenced until the 11th of April, 1881, was barred by the provisions of the statute. We are not, therefore, called upon to consider any other question in the case.

Judgment and order affirmed.

We concur: McKee, J.; McKinstry, J.

MARSHALL v. LIVERMORE SPRING WATER CO.

Nos. 8736, 8737; December 11, 1884.

5 Pac. 101.

Statute of Frauds.—An Agreement to Create a Lien on Real Estate will be void unless made in writing, subscribed by the party to be charged. It is not necessary to allege, in an action to enforce such lien, that the agreement was in writing.

Mortgage.—A Foreclosure Decree must not Direct a Sale of a Greater Interest than that mortgaged; it cannot embrace property of the mortgagor acquired subsequently to the execution of the mortgage.[1]

APPEAL from the Superior Court of the County of Alameda.

M. Mullany and Joseph Leggett for appellants; A. N. Drown and Jas. Wheeler for respondents.

ROSS, J.—These appeals were submitted together, and will be so considered. Both are taken from a decree of foreclosure and sale, and from an order refusing a new trial of the action—one being brought by the defendant and the other by the intervener. According to the averments of the complaint in intervention, the liens claimed by the intervener grew out of contract. The agreements out of which they are alleged to have arisen are not in the pleading expressly stated to have been in writing, nor was that necessary. But if by statute they were required to be in writing, the intervener was bound to prove them by the production of the writings or other competent evidence, issue having been taken on the making of such agreements: Vassault v. Edwards, 43 Cal. 463. By section 1971 of the Code of Civil Procedure it is provided:

"No estate or interest in real property other than for leases for a term not exceeding one year, nor any trust or power

[1] **Cited** and approved in Mitchell v. Canal etc. Co., 75 Cal. 479, 17 Pac. 250, holding that the decree in a foreclosure suit follows the description of the property as contained expressly in the mortgage embodied in the complaint, unless the complaint shows that something else is to be added.

over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same or by his lawful agent thereto authorized by writing."

And sections 2922 and 2924 of the Civil Code read:

"2922. A mortgage can be created, renewed, or extended only by writing executed with the formalities required in the case of a grant of real property."

"2924. Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when, in the case of personal property, it is accompanied by actual change of possession, in which case it is deemed a pledge."

At the trial the intervener admitted that the alleged agreements were not in writing, but were entirely verbal. They were therefore void under the provisions of the statute, and, being void, the court below rightly found that they were not made: Porter v. Muller, 53 Cal. 677. But in one respect the decree appealed from is erroneous. It directs the sale of a greater interest than the defendant mortgaged. By this we must not be understood as saying that the plaintiff should not, in his complaint, have more specifically described the property mortgaged. On the contrary, whenever there is uncertainty in the description of the mortgaged property the action foreclosing the mortgage is the proper place in which to put an end to the uncertainty, if it can be done: Crosby v. Dowd, 61 Cal. 557. But, of course, the decree cannot embrace property not included in the mortgage. Here the defendant mortgaged: First, "all of its interest, claim, demand, and property of, in, and to the waters of the creek known as Mocho, and all easements, rights of way, dams, ditches, reservoirs, pipes, flumes, gates, faucets, connections, and appurtenances used in appropriating said water, or in conducting the same to said town of Livermore or elsewhere"; second, "and also all the water, water rights, pipes, flumes, lands, rights of way, and property of every description now owned or used (that is to say, at the time of the execution of the mortgage owned or used) by said mortgagor in, belonging to, or in connection with, its waterworks in the town of Livermore, in said Ala-

meda county, and in or in connection with or belonging to the Las Pocitas springs and creek, in said Murray township"; third, "and also all the lands and improvements which said mortgagor now (that is to say, at the time of the execution of the mortgage) owns on the elevated ground around or in close proximity to its reservoirs used in appropriating said waters of Las Pocitas springs and creek."

In making its decree the court below properly limited the sale it directed to be made of the property thirdly described in the mortgage, to such of said property as the mortgagor owned at the time of the execution of the mortgage; but, with respect to the property secondly described in the mortgage, the court decreed a sale of "all the waters, water rights, pipes, flumes, lands, rights of way, and property of every description at the date of said mortgage, or since, owned or used by the mortgagor in, belonging to, or in connection with, its said waterworks in the town of Livermore, in said Alameda county, and in or in connection with or belonging to Las Pocitas creek and springs, in said Murray township." In directing a sale of such property, coming within the last above description, as the mortgagor acquired since the execution of the mortgage, the court manifestly went beyond the limits of the mortgage. In that respect the decree may, and it is claimed by appellants that in fact it does, include property acquired by the defendant subsequent to the mortgage, and which does not fall within either of the descriptions firstly and thirdly given in the mortgage. If we could see clearly that the rights of the respective parties could be protected by simply directing a modification of the decree to accord with the views above expressed, we would remand the cause for that purpose; but, as the case is presented, we are of opinion that the safest way is to direct a new trial.

Judgment and order reversed, and cause remanded for a new trial.

I concur: McKinstry, J.

I concur in the judgment: McKee, J.

ESTUDILLO v. AGUIRRE.

No. 9699; December 15, 1884.

5 Pac. 109.

Promissory Note—Failure of Consideration.—A promissory note given by defendant to plaintiff on the representation, innocently made, that the probate court had allowed plaintiff such sum for his services as guardian of defendant, when in reality no such sum had been allowed, is invalid for failure of consideration.

APPEAL from Superior Court, Los Angeles County.

F. H. Howard and J. R. Scott for appellant; Graves & Chapman for respondent.

By the COURT.—The appeal is by plaintiff from an order granting a new trial. The promissory note sued on herein was given in part for five hundred dollars, which plaintiff informed defendant had been allowed him by the probate court for his services as guardian of defendant. The plaintiff had been informed by his attorney that five hundred dollars had been so allowed for his services, and believed his informant; but, in fact, the probate court had not made such allowance. At the trial in the court below of the action now here, the court, notwithstanding defendant's objection that the same was irrelevant, immaterial, and incompetent, admitted evidence tending to prove the character, nature, and extent of plaintiff's services as guardian, and what his services were reasonably worth. The defendant duly excepted to the ruling. The note was given in part for a definite sum, which was represented to have been fixed, determined, and allowed by the probate court. There was no settlement between plaintiff and defendant at which five hundred dollars was agreed upon as a proper compensation for plaintiff's services as guardian. The note was given on the representation (innocently made) that the probate court had made the allowance. As the allowance had not been made, the consideration of the note failed to the extent of five hundred dollars. We think the court properly granted the new trial. Order affirmed.

HARRIS v. MORE and Others.

No. 9723; December 15, 1884.

5 Pac. 159.

Evidence—Record of Conviction of Murder as.—The record of conviction of murder is admissible as evidence of the fact that the person convicted was implicated in said murder.

APPEAL from the Superior Court of Santa Barbara County.

Action to recover reward.

W. C. Stratton for appellant; Thos. McNulta for respondents.

By the COURT.—We think the record of the conviction of Sprague of the murder of W. T. More was competent for the purpose of showing that Sprague was implicated in said murder, and that the court erred in excluding it for that purpose. The evidence introduced, together with that offered and erroneously excluded, was sufficient to entitle the plaintiff to have the issues submitted to the jury, and the court erred in granting a nonsuit. Judgment and order reversed.

BOYD v. SLAYBACK.

No. 9637; December 17, 1884.

5 Pac. 161.

Findings—Sufficiency of Description of Deeds.—Where, in an action concerning real property, there are but two deeds in the case considered, and they are referred to, in the findings and statement on motion for a new trial, as the "short deed" and "long deed," and the findings, evidence, and decree clearly show what property was described in the one known as the "short deed," and that the other deed, called the "long deed," contained a description of the residue of the property in controversy, the reference to them by such names is sufficiently certain.

APPEAL from the Superior Court of San Diego County.

Brunson & Welles for appellant; Chase, Arnold & Hunsaker for respondent.

SHARPSTEIN, J.—The plaintiff alleges in his complaint that on the twenty-third day of April, 1881, Mary B. Taggart duly made, executed and delivered to him two several deeds of conveyance, by one of which she conveyed to him certain described parcels of land, and by the other certain other parcels. According to the complaint, the number of parcels specified and described in one is much greater than the number specified and described in the other. Consequently, much more space is devoted to the description of the several parcels alleged to have been conveyed by one of the deeds than is devoted to the description of the several parcels alleged to have been conveyed by the other. Neither of the deeds was produced at the trial. The first witness examined was the plaintiff in his own behalf. He referred to one of the deeds as "the short deed," and to the other as "the second or larger deed." In the statement on motion for a new trial we find the following:

"Plaintiff here introduced in evidence the notarial record of the witness H. H. Dougherty, as far as the same relates to the acknowledgment of Mary B. Taggart, on the twenty-third day of April, 1881, of the two certain deeds wherein Mary B. Taggart was the grantor, and John B. Boyd was the grantee, description being the same as appears in the decree of the court herein."

Referring to said decree we find that the court adjudged the plaintiff to be the owner of the land described in the deed referred to in the findings as "the short deed," viz., the one which conveyed the least number of parcels of land, and that he had no title, right, or interest in the land described in the other deed. In the first finding of the court, the deed referred to as "the short deed" corresponds with the one so denominated in the decree. Another deed is referred to "as the other of said deeds referred to as the 'long deed.'" There are but two deeds in the case, and the evidence, findings, and decree clearly show what property was described in the one denominated "the short deed," and that the other

deed, denominated "the long deed," contained a description of the residue of the property in controversy. This we think to be sufficiently certain. The evidence as to the execution and delivery of the deed referred to as "the long deed" is not of such a character as would warrant any interference here with the finding of the court below on that question. The findings, as we read them, are not conflicting, and we think there is no error in the instructions given, and none in refusing to give any other. Judgment and order affirmed.

We concur: Thornton, J.; Myriek, J.

HARDY and Others v. SEXTON and Others.

No. 9508; December 17, 1884.

5 Pac. 162.

Partition—Evidence.—In an Action for Partition, where plaintiffs allege title in themselves to the undivided one-half of the premises and in defendants to the other undivided one-half, and defendants deny plaintiffs' title, allege title in themselves to the whole, and plead the statute of limitations, on the trial, after defendants have proved the entry of their grantor under one H., it is competent for the plaintiffs to show that H. acquired his title from B., who had been joint owner with plaintiffs' predecessor in interest, to the end that it might be determined whether the acts of defendants and their grantors had been sufficient to bar the plaintiffs' right of recovery.

APPEAL from the Superior Court of Santa Barbara County.

R. M. Dillard and S. L. Terry for appellants; Janett Richards for respondents.

MYRICK, J.—Partition. Plaintiffs allege title in themselves to the undivided one-half of the premises, and in defendants to the other undivided one-half. Defendants deny plaintiffs' title, allege title in themselves to the whole, and plead the statute of limitations. The plaintiffs, after proving that Box and Summers were the owners of the premises in 1853, and

that Summers executed a deed to Coon, plaintiffs' intestate ancestor, rested. The defendants then proved entry in 1867 by their grantor, under a deed from Huse, and subsequent continuous, open, notorious, exclusive, and adverse possession. Plaintiffs then offered in rebuttal a judgment against Box, and an execution sale and sheriff's deed of Box's interest to Huse, defendants' grantor. This evidence was objected to on the sole ground that it was not evidence in rebuttal, and should have been offered as part of plaintiffs' case in chief. The court sustained the objection. We think the ruling was erroneous. After defendants had proved the entry of their grantor under Huse, it was competent for the plaintiffs to show that Huse acquired his title from Box, who had been a joint owner with plaintiffs' predecessor in interest, Summers, to the end that it might be determined whether the acts of defendants and their grantors had been sufficient to bar the plaintiffs' right of recovery.

It will be observed that we are passing solely upon the admissibility of the evidence as against the objection made. Judgment reversed and cause remanded for a new trial.

We concur: Sharpstein, J.; Thornton, J.

CHAPMAN v. POLACK.

No. 8819; December 20, 1884.

5 Pac. 232.

Judgment—Description of Property.—It being an admitted fact that the Geyser springs and hotel improvements are located on the N. E. ¼ of section 13 (the property in controversy), there was no impropriety in adding to the description of the property in the judgment the words "the same being known as the 'Geyser Hotel property.'"

APPEAL from the Superior Court of the City and County of San Francisco.

George A. Nourse for appellant; James F. Stuart and McClure & Dwinelle for respondent.

ROSS, J.—Most, if not all, of the questions involved in this appeal are substantially determined by the cases entitled Chapman v. Polack, 58 Cal. 553, United States v. Chapman, 5 Saw. 528, Fed. Cas. No. 14,785, and Polack v. Gurnee, No. 8229, 66 Cal. 266, 5 Pac. 229.

We do not find any denial of the averment of the cross-complaint to the effect that the Geyser springs and hotel improvements are located on the N. E. ¼ of section 13. It was therefore an admitted fact in the case, and being so, there was no impropriety in adding to the description of the property in the judgment the words "the same being known as the 'Geyser Hotel property.'"

Judgment and order affirmed.

We concur: McKee, J.; McKinstry, J.

PEOPLE v. SILVAS.

No. 20,032; December 26, 1884.

5 Pac. 246.

Homicide—Evidence—Instructions.—Verdict of the Jury, finding defendant guilty of the crime of murder, held justified by the law and evidence given in the case. Instructions held full and correct.

APPEAL from the Superior Court of Los Angeles County.

Z. T. Carson for appellant; Attorney General for respondent.

MORRISON, C. J.—The district attorney filed an information in the superior court of Los Angeles county, charging the defendant with the crime of murder, alleged to have been committed in the city of Los Angeles on the morning of July 21, 1884. The facts in the case are clearly established by the evidence, and are briefly as follows: James McIntyre, the party killed, and a friend named Hickey were passing along New High street, in Los Angeles, when they saw the defendant sitting in a chair on the sidewalk nearly opposite a saloon

kept by one Olivier. The sidewalk at that place was about seven feet wide, and the man was sitting between two and three feet from the side of the house, occupying very nearly the middle of the walk. As the deceased and Hickey passed the defendant between him and the house, one of them rubbed against him, struck him with his foot on the leg, and knocked his hat off, as the defendant says, whereupon the defendant got up from the chair upon which he was sitting and addressed a very opprobrious epithet to the two men, particularly to Hickey, and drawing a large knife, the blade of which was about six inches in length, made a hostile demonstration with it, Hickey being the particular object of his anger. Thereupon the deceased struck at the defendant. The evidence does not show clearly whether the blow reached the defendant or not. At all events, it was a blow with the fist simply, and did not do the defendant any injury. Thereupon the defendant attacked the deceased with his knife, and pursued him at least eighty or one hundred feet, striking at him and cutting him with the knife until the deceased fell upon the ground and died in a few minutes. The savage nature of the attack is shown by the character of the wounds inflicted. The physician who made the post mortem testified as follows:

"The external examination showed five wounds; two on the fingers of the right hand—one on the back of one finger and the other on the under side of the next finger. These two lay in a direct line with each other, and could have been made at one time with a double-edged knife. They were small wounds. Another wound was in the left groin, one inch and a half in length, and out of this the bowels were protruding about eight or ten inches. There was another wound in the left side, about an inch and a half or two inches from the left nipple, and an inch long. The fifth wound was on the same side, just back of the shoulder joint. . . . . Both the wound in the groin and the one in the side were necessarily fatal, and, ordinarily, life would last about ten or fifteen minutes after the infliction of such wounds."

No weapon of any kind was found on the body of the deceased, and it is not pretended that any was seen by any of the witnesses—not even by the defendant. The case is one of a felonious attack by the defendant upon Hickey, an attempt by

the deceased, however rash and ineffieacious, to resist sueh an attack, and then a most ferocious and bloodthirsty assault on deceased. The defendant pursued his unarmed and unresisting victim for eighty, and perhaps one hundred, feet, cutting at him with his knife and inflicting on him wounds from which he died in a few minutes. The learned counsel for the defendant labors to show that the crime does not rise higher than the degree of manslaughter; but the jury found the defendant guilty of murder in the first degree, and we do not see anything harsh or unreasonable in the verdict. The charge of the court to the jury is remarkably full, clear, and correct. With the law as laid down by the court the defendant had no eause of complaint; and the verdiet of the jury is fully justified by that law, and the evidence given in the case. Judgment and order affirmed.

We concur: Ross, J.; Myrick, J.; Thornton, J.

BUTCHER v. VACA VALLEY & C. L. R. CO.*

No. 7883; January 9, 1885.

5 Pac. 359.

Railroad—Fires—Allegation and Proof.—Where the complaint in an action against a railroad company alleges the destruction of the plaintiff's property by a fire kindled on his premises by sparks which proceeded directly from defendant's locomotive to plaintiff's land, but the proof is that such property was destroyed by a fire kindled on the adjoining land by sparks from the same source, which fire moved onto plaintiff's land, this does not constitute a material variance between the proof and the allegation.

Railroad—Fires—Proof of Similar Acts.—It is not erroneous to permit proof that prior and subsequent to the fire which produced the injury complained of, other fires had been kindled by defendant's engines.[1]

*For subsequent opinion in bank, see Butcher v. Vaca Valley etc. R. R. Co., 67 Cal. 518, 8 Pac. 174.

[1] **Cited** and followed in Florida E. C. Ry. Co. v. Welch, 53 Fla. 152, 162, 44 South. 255, holding that if the complaint charges a direct ignition of plaintiff's property by sparks from the defendant's engine, and the proof is that the direct ignition was suffered by a neighbor's property and thence communicated to that of plaintiff, there is no material variance.

Railroad—Fires—Evidence of Repairs to Engine.—Evidence of repairs made on the smokestack of the locomotive, which it is alleged caused the fire complained of, is properly admissible.

Railroad—Fires—Preponderance of Evidence.—Whether the preponderance of evidence was on the one side or the other of a question of fact is a matter for the jury alone to determine.

Railroad—Fires—Instructions to Jury.—An instruction to a jury that if they "find that the fire complained of was kindled by defendants under circumstances incompatible with the idea that the engine was of approved construction and properly managed," they shall find for plaintiff, implies that there was evidence sufficient to justify such a finding, and is erroneous.

Myrick, J., dissenting.

APPEAL from the Superior Court of Solano County.

Jos. McKenna for appellant; G. A. Lamont and W. Van Dyke for respondents.

SHARPSTEIN, J.—Whatever may have been the origin of the fire which consumed the plaintiff's grain, none of the witnesses saw it before it had reached "Wilson's field," which lies between the defendant's railroad and the plaintiff's land. The allegation of the complaint is that "by reason of the carelessness and negligence of said company (defendant), and the engineers and employees thereof, the fire from the engine and locomotive of said road was suffered to escape and did escape, and by reason thereof came upon the land of the plaintiff," etc. To the introduction of evidence of the discovery of the fire in "Wilson's field," the defendant objected upon the ground that "the allegation of the complaint is as to a fire communicated by the defendant's engine to the plaintiff's field." The most favorable light in which the evidence can be viewed for the plaintiff is that it tends to prove that a fire was kindled in "Wilson's field" by sparks emitted by said locomotive, and that the fire so kindled moved on through said field until it reached the land of the plaintiff, where it caused the injury complained of. And if this constitutes a material variance between the proof and the allegation, the objection should have been sustained. But the court overruled it. The ruling was excepted to, and is specified as error.

Whether the destruction of the plaintiff's property was caused by a fire kindled on his premises by sparks which proceeded directly from the locomotive to his land, or by a fire kindled on land adjoining his by sparks from the same source, would not affect the defendant's liability: Henry v. Southern P. R. Co., 50 Cal. 176; Fent v. Toledo P. & W. Ry. Co., 59 Ill. 349, 14 Am. Rep. 13; Insurance Co. v. Tweed, 7 Wall. (U. S.) 44, 19 L. Ed. 65; Powell v. Deveney, 3 Cush. (Mass.) 300, 50 Am. Dec. 738; Vandenburgh v. Truax, 4 Denio, 464, 47 Am. Dec. 268; Hart v. Western R. Co., 13 Met. (Mass.) 99, 46 Am. Dec. 719; Perley v. Eastern R. Co., 98 Mass. 414, 96 Am. Dec. 645; Piggot v. Eastern Counties Ry. Co., 54 E. C. L. 229; Smith v. London & S. W. R. Co., L. R. 5 C. P. 98; Field v. New York C. R. Co., 32 N. Y. 345. If the allegation had been strictly in accordance with the evidence, the material question would have been: Was the plaintiff's property destroyed by a fire kindled in "Wilson's field" by sparks emitted from defendant's locomotive? As it is, if the evidence had strictly corresponded with the allegation, it would have shown that sparks emitted from the defendant's locomotive proceeded directly to plaintiff's land, and there kindled the fire which consumed his property. In either case the gravamen of the charge would be: that the fire was caused by the negligence of the defendant in permitting sparks to escape from its locomotive. So the only variance between the allegation and the proof is as to the place where the fire which, it is alleged, escaped from defendant's locomotive first came in contact with inflammable matter; and the liability of the defendant would be the same whether the locus in quo was on the plaintiff's land or in "Wilson's field"; therefore it is not apparent to us how the defendant could have been actually misled to its prejudice in maintaining its defense upon the merits: Code Civ. Proc., sec. 469.

If the plaintiff's witness Marshall had testified that he saw a fire kindled by sparks emitted from a locomotive on the defendant's road, either before or after the destruction of the plaintiff's property, such evidence would have been admissible to show the cause of the injury complained of, or to show negligence in the construction or working of defendant's locomotive: Henry v. Southern P. R. Co., 50 Cal. 176; Home Ins. Co. v. Pennsylvania R. Co., 11 Hun (N. Y.), 182; Grand

Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356; Field v. New York etc. R. Co., 32 N. Y. 339; St. Joseph & D. C. R. Co. v. Chase, 11 Kan. 47; Huyett v. Philadelphia & R. R. Co., 23 Pa. 373; Piggott v. Eastern Counties Ry. Co., 3 C. B. 229; Illinois Cent. R. Co. v. Mills, 42 Ill. 407; Ellis v. Portsmouth & R. R. Co., 2 Ired. (N. C.) 138.

In Henry v. Southern P. R. Co. this court said: "We think there was no error in permitting proof that prior and subsequent to the fire which produced the injury complained of, other fires were kindled by defendant's engine." But the witness Marshall did not testify that the fire, which he saw about two weeks after plaintiff's property was destroyed, was caused by defendant's locomotive. On the contrary, he testified that he did not know what caused it. But we are not called upon to determine the weight of such evidence. The question of its admissibility is alone before us; and we think it was admissible under the cases above cited. If evidence that the main fire was first discovered soon after the engine had passed near the spot where it was discovered was admissible, of which we entertain no doubt, it would seem that evidence of another fire soon afterward, discovered near the track over which the same engine had, but a little time before the discovery, passed, would be admissible. Evidence of repairs made on the smokestack of the locomotive which it is alleged caused the fire complained of was properly admitted: St. Joseph & D. C. R. Co. v. Chase, 11 Kan. 47.

We are not prepared to hold that the court erred in overruling the defendant's motion for a nonsuit. In Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356, the court said: "It was proved that engines run by the defendant had crossed the bridge not long before it took fire. The particular engines were not identified, but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire."

We think the fact of defendant's locomotive passing the field where this fire was first discovered, only a few minutes before the discovery of it, raised at least some probability, in the absence of proof of any other known cause, that the fire was caused by said locomotive. The facts that a strong wind was blowing from the north, and the fire was first discovered south of where the locomotive had just passed, tended in some

degree to strengthen that probability. The evidence given by the witness Babb tended in some degree to show that this engine or locomotive was lighter and had shorter flues than some of defendant's engines, and for those reasons would be more liable to emit fire than heavier engines with longer flues. Whether the preponderance of evidence was on the one side or the other of that question was for the jury alone to determine.

Among the instructions given to the jury was the following, which was excepted to:

"In determining the question whether defendant's engine was of the most approved construction and properly managed, the jury should consider all the testimony in the case; and if they find that the fire complained of was kindled by the defendant's engine under circumstances incompatible with the idea that the engine was of approved construction and properly managed, they may find for the plaintiff."

By saying to the jury, "If you find that the fire complained of was kindled by defendant's engine under circumstances incompatible with the idea that the engine was of approved construction and properly managed," the court implied that there was evidence sufficient to justify such a finding. Otherwise the court was not justified in assuming that the jury might so find. And the circumstances under which the fire was kindled, as developed by the evidence, were that it was first discovered in "Wilson's field" soon after said engine had passed over the road near the north line of said field; and that a high wind was blowing from the north at the time. The fire had been kindled before anyone discovered it. From these circumstances alone the jury were in effect told that they might find that the defendant's engine was not of approved construction and properly managed, which was tantamount to saying that if the fire in "Wilson's field" was kindled by fire which had escaped from said engine, the jury might presume negligence in the construction or management of it, and on that evidence alone find for the plaintiff generally.

Whether upon the entire evidence the jury would not have been justified in finding that the engine was improperly constructed or negligently managed is a question on which we express no opinion. We simply say that in this state the cir-

cumstances under which the fire was kindled, as developed by the evidence, would not, in the absence of any other evidence bearing on the question, justify a finding that the engine was not of approved construction and properly managed. And as the instruction excepted to clearly implies that the jury would be justified in so finding upon those circumstances alone, the defendant is entitled to a new trial. Judgment and order reversed.

We concur: Thornton, J.; McKinstry, J.; McKee, J.

I concur in the judgment of reversal: Morrison, C. J.

ROSS, J.—I concur in the judgment of reversal, and, in the main, in the opinion of Mr. Justice Sharpstein. I do not agree, however, that the testimony of the witness Marshall was admissible, nor do I agree with what is said in the opinion with respect to the witness Babb.

MYRICK, J.—I dissent from the judgment reversing the judgment and order of the court below, and from the reasons therefor.

MOORE v. CLEAR LAKE WATERWORKS.*

No. 9452; January 12, 1885.

5 Pac. 494.

Ditch—Allegation of Carrying Capacity of.—The capacity of a ditch is not sufficiently alleged by a statement that a ditch carries a certain number of cubic feet of water, and that the flow is at a given rate per second, without stating the duration of time within which the named quantity of water passes.

Riparian Rights—Diversion of Water—Injunction.—Unless the flow in a stream to the land of a riparian proprietor has been appreciably or perceptibly diminished, he is not entitled to an injunction against another for wrongfully diverting water from his stream.

*For subsequent opinion in bank, see Moore v. Clear Lake Water Works, 68 Cal. 146, 8 Pac. 816.

APPEAL from the Superior Court of the County of Yolo.

Fox & Kellogg for appellant; W. B. Treadwell, F. E. Baker, and Wallace, Greathouse & Blanding for respondent.

McKINSTRY, J.—The court below found "all the allegations of the complaint herein are true, except that the capacity of the ditch of plaintiff, therein described, is four hundred and thirty-two cubic feet of water per second, and no more." The first count of the complaint fails to aver intelligibly what is the capacity of plaintiff's ditch. The allegation in the first count is: "The said ditch, during all the times, etc., had the capacity to carry one hundred and eighty cubic feet of water, running and flowing at the velocity of four feet per second." It is very clear that a statement that a ditch has capacity to carry one hundred and eighty "cubic" feet of water conveys no distinct idea, and the words "running and flowing at the velocity of four feet per second," add no force or meaning to those which precede them. Seven hundred and twenty cubic feet of water might indeed pass into a ditch in a second of time, or so might one hundred and eighty cubic feet. But the allegation of the complaint is not an allegation of either of those two things. An acceleration of the current would increase the quantity of water passing any point on the ditch in any fixed period of time. But an allegation that a ditch carries a certain number of cubic feet of water, and that the flow is at a given rate per second, without stating the duration of time within which the named quantity of water passes, omits the datum which can alone give precision to the averment.

It is urged by respondent that the second count of the complaint (the allegations of which the court found to be true) shows plaintiff to be a riparian proprietor, and entitled, as against the defendant, who is not a riparian owner, to all the water of the stream. The second count alleges that defendant has diverted and is diverting a large portion of the waters of the creek. It is impossible to determine what quantity of water may, in the opinion of the pleader, be a large portion. It is apparent that a great quantity of water may be taken from a large stream without materially, or even perceptibly, diminishing the flow of the stream below the point

of diversion. There is no averment that by reason of the diversion by defendant the quantity of water in the creek when it reaches plaintiff's lands is reduced in such degree as even to be discoverable. For aught that appears from the complaint, Cache creek flows through such lands, bank full. Of course, if any quantity is diverted, the quantity so diverted does not reach the lands below. But conceding, for the purposes of the argument, the rights of riparian owners to be as suggested by respondent's counsel, a plaintiff is not entitled to an injunction unless the flow to his land has been appreciably, or at least perceptibly, diminished by diversion above. Judgment reversed and cause remanded for a new trial.

We concur: Sharpstein, J.; Myrick, J.; Thornton, J.; Ross, J.; McKee, J.; Morrison, C. J.

THOMPSON v. SPRAY.

No. 9496; January 14, 1885.

5 Pac. 506.

Dismissal by Plaintiff—When Allowed.—Where the Answer in an Action pleads matter of defense only, the plaintiff is at liberty to dismiss the action at any time before trial, upon payment of costs.

APPEAL from the Superior Court of Amador County.

Eagan & Armstrong for appellant; A. Caminetti for respondent.

ROSS, J.—The cross-complaint having been stricken from the answer of the defendant, the latter pleading was left with matters of defense only. The plaintiffs were therefore at liberty to dismiss the action at any time before trial, upon payment of costs: Code Civ. Proc., sec. 581. This they did, the dismissal having been entered by the clerk. The purported trial of the 5th of November, 1883, was therefore of an action which had been previously dismissed. Order re-

versed, and cause remanded, with directions to the court below to set aside the judgment.

We concur: McKee, J.; Myrick, J.; McKinstry, J.; Morrison, C. J.; Sharpstein, J.

FARNSWORTH v. WIXOM.

No. 9659; January 14, 1885.

5 Pac. 506.

Appeal—Conflicting Evidence.—Where the Judgment of the Lower Court is founded on conflicting evidence, it will not be disturbed on appeal.

APPEAL from the Superior Court of San Bernardino County.

C. W. C. Rowell and H. M. Willis for appellants; Byron Waters for respondent.

By the COURT.—This is an action to set aside certain deeds on the ground that they were never delivered. On this issue the evidence is conflicting, and the court below having held that the deeds were delivered, we cannot interfere with the judgment, and order denying plaintiff's motion for a new trial. Judgment and order affirmed.

In re Estate of VAN TASSEL, Deceased.

No. 9420; January 16, 1885.

5 Pac. 611.

Administrator's Account—Vouchers.—Where, on the Settlement of an administrator's account, items aggregating more than fifteen hundred dollars are allowed, for which no vouchers are produced, and as to which no testimony is given when, where, or to whom the payments were made, held to be error.

APPEAL from the Superior Court of the County of Sacramento.

Henry Edgerton and Add. C. Hinckson for appellants; J. F. Ramage for respondent.

By the COURT.—Settlement of an administrator's account. Items in the account aggregating more than fifteen hundred dollars were allowed for which no vouchers were produced, and as to which there was no testimony regarding when, where, or to whom the payments were made. This was error: Code Civ. Proc., sec. 1632.

Orders reversed and cause remanded for further proceedings.

QUIMBY v. BUTLER and Others.

No. 9661; January 20, 1885.

5 Pac. 613.

Appeal.—Error, Without Injury, is not ground for reversal.

APPEAL from the Superior Court of Los Angeles County.

A. J. King, J. T. Richards and S. Haley for appellant; T. J. De Puy for respondents.

By the COURT.—The record shows that the issues of fact raised by the pleadings in the action were submitted to the jury upon evidence given by the respective parties. Of these issues, one involved the fact of a former recovery, and another of coverture of the plaintiff at the commencement of the action. The jury returned a verdict for defendants; and as the verdict may have been rendered upon one or another, or all of said issues, the assigned errors, of which the appellant complains, if errors at all, were errors without injury. Judgment and order affirmed.

IVERSON v. JONES.

CHALFANT v. SAME.

Nos. 8789, 8790; January 26, 1885.

5 Pac. 626.

Appeal.—An Undertaking on Appeal Filed More Than a Month Before the Notice of appeal is filed is no undertaking at all, and an appeal based thereon must be dismissed.[1]

APPEALS from the Superior Court of Mendocino County.

J. T. Rogers for appellant; T. J. Carothers for respondent.

By the COURT.—The court is of opinion that the appeals in these cases must be dismissed. The undertakings on appeal were filed more than a month before the notices of appeal were filed. This, in our view, is not the undertaking required by law. It is not the case of insufficiency in the undertaking, but it is no undertaking at all. The motions to dismiss must be granted; and it is so ordered.

PEOPLE ex rel. O'DONNELL v. BARTLETT, Mayor.

No. 9871; January 27, 1885.

5 Pac. 674.

Mandamus — Board of Supervisors—Repeal of Resolution.— Where the resolution of a board of supervisors, to enforce which an alternative writ of mandate has been issued, is afterward repealed, the writ must be dismissed.

Mandamus to compel the new city hall commissioners to allow fitting up of a public morgue in place set apart by resolution of the board of supervisors.

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[1] **Cited** and approved in Little v. Jacks, 68 Cal. 346, 11 Pac. 129, on the point that an undertaking on appeal filed before the filing of the notice of appeal is ineffectual for any purpose.

W. A. Cornwall for petitioner; John Lord Love for respondent.

By the COURT.—The relator bases his claim on a resolution of the board of supervisors, passed in the month of December, 1884. It appears by the answer of respondent that said resolution was afterward, and before the filing of said answer, repealed by said board. It therefore follows that the alternative writ heretofore issued must be discharged, and the proceeding be dismissed; and it is so ordered.

PEOPLE v. HOLLADAY.*

No. 8501; February 7, 1885.

5 Pac. 798.

Judgment—Conclusiveness to Bar Subsequent Action.—A Judgment Against a City in a former action, declaring that no dedication of certain land had been made, is a bar to a subsequent action by the city against the same parties to obtain possession of the land under the same claim of alleged dedication.

APPEAL from the Superior Court of the City and County of San Francisco.

J. F. Cowdery for appellant; S. W. Holladay, W. C. Belcher and Mastick, Belcher & Mastick for respondent.

ROSS, J.—The question involved in this action is the precise question that was involved in the action brought in the year 1863, in the late fourth district court, by the same plaintiff against the same defendant; that is to say, the alleged dedication by the lawful owner and proprietor thereof, prior to the year 1863, to public use as a public square by the name of "Lafayette Park," of the lots of land in controversy. In the former action, after trial, it was, on the eleventh day of

*For subsequent opinion in bank, see People v. Holladay, 68 Cal. 439, 9 Pac. 655.

July, 1864, solemnly adjudged that no such dedication was ever made or suffered, but that, on the contrary, the property in question was, at the time of the commencement of that action, and at the time of the trial thereof and judgment therein, the private property of the defendant, Holladay, free and clear of any and all dedication whatsoever. That judgment, being the judgment of a court of concurrent jurisdiction directly upon the point, is conclusive as respects the same matter now again directly in question between the same parties. The correctness of the position of the learned counsel for the appellant in regard to the effect of the act of Congress of July 1, 1864, may be conceded, and yet it does not aid the appellant.

If the property in dispute was dedicated in 1858 to public use, of course the act of Congress of 1864 did not destroy or in any respect impair such dedication; but on the contrary, as said here in Hoadley v. San Francisco, 50 Cal. 274, "by granting and relinquishing the title of the United States to the city for the uses and purposes mentioned in the act of March 11, 1858, it ratified and confirmed the dedication, and made it operative upon the legal title, as well as such title as the city held prior to the act of July 1, 1864, and thus virtually perfected the dedication." But if there was no dedication prior to the passage of the act of Congress of July 1, 1864, there was no dedication for that act to feed. And that there was none was distinctly adjudged by the fourth district court in the former action. It is too late now to inquire whether there was error in that adjudication. As between the parties thereto and their privies, that judgment conclusively established that there had theretofore been no dedication of the disputed property, but that the same then was the private property of the defendant, Holladay, free and clear of any and all dedication. And as the present action, as shown by the plaintiff's complaint, is founded upon the same alleged dedication involved in the former action, the judgment in that is a complete bar to the present one.

Judgment and order affirmed.

We concur: McKinstry, J.; McKee, J.

MULLALLY v. IRISH-AMERICAN BENEVOLENT SOCIETY.

No. 8717; February 17, 1885.

6 Pac. 78.

Benevolent Association—Sick Benefits—Burden of Proof.—In an action against a benevolent association for the recovery of sick benefits, the burden of proof is on the plaintiff to establish a by-law, rule, or custom rendering the society liable for such sick benefits.

APPEAL from the Superior Court of the City and County of San Francisco.

H. A. Powell and Edgar M. Wilson for appellant; M. C. Hassett for respondent.

See 69 Cal. 559, 11 Pac. 215.

By the COURT.—The court below found: "The widow is not entitled, under the constitution or by-laws of said society (defendant), to recover benefits for sickness due to a member at the time of his death; nor is such widow entitled to recover such benefits under any rule or custom prevailing in said society." It was for the plaintiff to establish the existence of some provision of the constitution, or of some by-law, or (at least) of some rule or custom, which, on the facts proved, made it the duty of defendant to pay to plaintiff the amount of benefits for sickness due to deceased at the time of his death. The court below was justified in finding that plaintiff failed to establish either such provision of the constitution, or such by-law, or such rule or custom.

Judgment and order affirmed.

OLIVER, Administrator, v. BLAIR and Another.

No. 8809; February 18, 1885.

5 Pac. 917.

Appeal Dismissed as to Defendants, Who Waived a Right to Appeal by stipulation in the lower court.[1]

APPEAL from the Superior Court of the City and County of San Francisco.

W. S. Goodfellow for appellant; W. M. Pierson, A. Comte, Jr., and Jos. Napthaly for respondents.

By the COURT.—In this case the defendants, D. B. Blair and Macfarlane, Blair & Co., by stipulation in the lower court, waived their appeal to this court; and thereafter and thereupon satisfaction of the judgments against them was entered. A motion is made to dismiss the appeal of the defendants above named, which is granted.

Appeal dismissed.

DINGLEY and Others v. GREENE and Others.

No. 8788; February 23, 1885.

6 Pac. 81.

Building Contract—Construction of Provisions.—A condition in a building contract that "should the contractor at any time during the progress of the work refuse or neglect to supply a sufficiency of material or workmen, the owner shall have power to provide mate-

[1] **Cited** with approval in United States Consol. Seeded Raisin Co. v. Chaddock & Co., 173 Fed. 579, 97 C. C. A. 527, which holds that a stipulation, if based on a valid consideration, to refrain from appeal from the judgment about to be had in a suit between the parties will be enforced.

Cited and approved in Hibernia Sav. Society v. Waymire, 152 Cal. 288, 92 Pac. 646, holding that by consenting to the giving of judgment to his adversary, a party deprives himself of all right to appeal.

rials or workmen, after one day's notice in writing being given to finish said work, and the expense shall be deducted from the amount of the contract," does not require that the owner shall, on default of the contractor, either finish the work in his place, or wait until the time has expired when the contract was to be finished under the agreement, and then proceed against the contractor for damages. The owner may, instead, enter into an independent contract for the completion of the work.

APPEAL from the Superior Court of the City and County of San Francisco.

Walter Van Dyke for appellants; McAllister & Bergin for respondents.

By the COURT.—1. There was sufficient evidence to justify the findings that the only persons interested in the contract between McCann and defendant Greene were the parties to that contract.

2. It was stipulated that certain averments should be considered to be incorporated in the complaint, and denials of them considered to be inserted in the answer. The averments are: "The defendant Greene paid to defendant McMeekan the sum of three thousand dollars, or thereabouts, before the same became due under his contract, and with full notice and knowledge on the part of said Greene of the claims and liens of said plaintiffs, and in fraud of their rights in the premises."

It is contended by appellant that the judgment should be reversed because the court below failed to find on the issue made by the denial of the foregoing allegations. But the issue is immaterial. There is no averment that when Greene paid McMeekan any sum due upon his contract she had notice of claims of plaintiffs, but that she had such notice when she paid an additional sum of three thousand dollars, or thereabouts, not due, and which, so far as appears, never became due to McMeekan.

3. It is urged that the contract between Greene and McMeekan was "nonforfeitable"; that by the terms of that contract it was provided, "should the contractor at any time during the progress of said works refuse or neglect to supply a sufficiency of material or workmen, the owner shall have

power to provide materials or workmen, after one day's notice in writing being given, to finish said works, and the expense will be deducted from the amount of the contract"; that by the terms of her contract she was limited to two courses of action: "she must either wait until the time had expired when he had agreed to finish his contract, and then proceed against him for damages," or go on, in accordance with the clause quoted, "and finish the buildings in the place of the contractor." Gillen v. Hubbard, 2 Hilt. C. C. P. (N. Y.) 303, is relied upon to sustain the view of counsel. But that case only holds that when the owner has acted upon the clause of a contract "and given the notice in writing," and finishes the building, he becomes the contractor pro hac vice, and cannot afterward claim from the contractor any greater deduction from the contract price than the amount expended in completing the work. In such case the building is completed under the original contract. But the "contractee," or owner, is not bound to substitute himself as contractor and assume all the contractor's obligations. He may do so if he chooses, upon giving notice. Here the defendant did not give such notice (assuming it might have been constructively served on the contractor, who had absconded), but having paid to him all she owed him, neither gave him notice that she would finish the buildings, nor waited until the time was ripe to sue him for breach of his contract. She simply entered into an independent contract for the completion of the buildings.

Judgment and order affirmed.

CHESTER v. TOKLAS and Others.

No. 8218; February 23, 1885.

6 Pac. 85.

Assignment.—Upon the Assignment of a Secured Debt, the creditor may also assign his security.

APPEAL from the Superior Court of the City and County of San Francisco.

Stetson & Houghton for appellants; Jos. Napthaly for respondents.

ROSS, J.—The plaintiff is the assignee of George W. Chester, of whatever right of action or claim he had against the defendants by reason of the transfer by defendants to one Xarissa Hill of the note and mortgage next hereinafter alluded to. The findings show that on or about the sixth day of December, 1875, one H. W. Woodward executed to George W. Chester, or order, his promissory note for three thousand three hundred and thirty-three dollars and thirty-three cents, payable one year after date, with interest thereon at the rate of one per cent per month, to secure which he at the same time executed to Chester a mortgage; that, on the 18th of December of the same year, George W. Chester executed to the defendants five promissory notes, made payable to defendants or order, for the aggregate sum of two thousand three hundred and forty-one dollars and thirty cents, bearing interest at the rate of one per cent per month, and to secure their payment assigned to defendants the Woodward note and mortgage. Subsequently, and on the 12th of June, 1876, the defendants, in consideration of the face value of the five Chester notes, which was paid to them by one Xarissa Hill, assigned the five notes to her, together with the security therefor which they held, to wit, the Woodward note and mortgage; and according to the findings in this case, Xarissa Hill still holds the five notes executed by George W. Chester, together with the Woodward note and mortgage, as security for their payment.

In this state of facts, it is obvious that no wrong has been done to George W. Chester or his assignee, the plaintiff. The notes were negotiable and the security assignable. There is neither an admission in the answer nor an averment in the complaint that the assignment by defendants to Mrs. Hill of the Woodward note and mortgage was an absolute sale. The effect of the pleading is that the assignment was what the court below found it to be in fact, namely, an assignment of the security along with the debt for which it stood as security.

Judgment affirmed.

We concur: McKinstry, J.; McKee, J.

SNOW v. SUPERVISORS OF STANISLAUS COUNTY and Others.

No. 9944; February 25, 1885.

6 Pac. 90.

Mandamus in Supreme Court.—An Application for a Writ of Mandate will not be entertained by the supreme court until the petitioner has exhausted his remedy in the superior court, unless special cause be shown therefor. The fact that the petitioner, a candidate for the office of supervisor, was defeated in a contest for such office in the superior court is not sufficient cause for an application in the supreme court for a writ to compel the board of supervisors to allow him to exercise the office of supervisor, where, subsequent to the decision of the election contest, there was a change of the judge of such superior court.

Application for writ of mandate to compel the board of supervisors of Stanislaus county to allow petitioner to exercise his office as a member of such board. In a contest to determine petitioner's right to such office he was defeated, but subsequent to the judgment in the election contest, in the superior court, and prior to the application here made, there was a change in the judge of such superior court.

Schell & Bond for petitioner; Wright & Hazen for respondent.

By the COURT.—In this case the petitioner can bring his action for the writ of mandate in the superior court for the county above named. The reasons assigned for not bringing it in that court are insufficient, as there has been a change of the judge of that court since the judgment was rendered in the contested election case of Reynolds v. Snow. In accordance with the rule of this court the petitioner must seek his remedy in the superior court.

Application denied, and proceedings dismissed.

PALMER v. GALVIN and Others.

No. 9556; February 27, 1885.

6 Pac. 99.

Appeal.—The Approval of an Undertaking, on Appeal to the supreme court, may be set aside by the superior court, and the power to set it aside is not taken away by the filing of a transcript in the supreme court.

APPEAL from the Superior Court of the City and County of San Francisco.

A. C. Searle for appellant; Thos. C. Hurley for respondent.

By the COURT.—This court is of opinion that the court below had full power, on the evidence before it, to set aside the approval of the undertaking in this case. Nor did the former approval of such undertaking for a stay, and the appeal to this court, and the filing of the transcript in this court, take away this power. The stay is only of the proceedings on the judgment or order appealed from, and the matters embraced therein: Code Civ. Proc., sec. 946. The action of the court below in vacating the approval of the undertaking did not affect in any way the matters embraced in the judgment or order appealed from. The judgment or order stands, though there was no undertaking filed. The appellant is allowed to give a new undertaking for a stay, with sufficient sureties, in the amount required by and conditioned according to law, in ten days from this date, to be approved by the chief justice, and in the meantime proceedings on the judgment in the court below are stayed. All other relief is denied. So ordered.

PEOPLE v. PRATHER.

No. 20,013; March 10, 1885.

6 Pac. 315.

Instructions—Exceptions to Part of Charge.—The judgment of a trial court will not be disturbed on the ground of erroneous instructions, because portions of the charge may be objectionable, if the charge itself, as a whole, fairly presents to the jury the law bearing on the evidence before them.

APPEAL from the Superior Court of the County of Yolo.

The defendant was convicted on a charge of assault with intent to commit murder, and on appeal from an order denying him a new trial assigned as error certain portions of the charge of the judge to the jury.

F. C. Baker and J. Lambert for appellant; Attorney General for respondent.

By the COURT.—As the evidence is not before us, it is our duty to affirm the judgment and order denying a new trial, unless some one of the instructions was erroneous in any conceivable state of the evidence. Portions of the charge may be subject to criticism, and are not to be commended as models of clear and accurate statements of propositions of law; but other portions explain these, so that the charge, as a whole, fairly presents the law bearing on the evidence which may be assumed to have been before the jury. The instructions, therefore, are not materially erroneous.

Judgment and order affirmed.

REGENTS v. DUNN.

No. 9440; March 16, 1885.

6 Pac. 377.

University of California—Disbursement of Funds.—Funds and securities deposited by the regents of the University of California in the state treasury may be drawn therefrom in the manner provided by statute, namely, on a resolution of the said regents, indorsed by the governor of the state, demanding the same, and section 22, article 4, of the California constitution (providing how money may be drawn from the treasury in other cases) does not apply to such funds and securities, and the warrant of the controller is therefore not an essential prerequisite to the disbursement of such funds by the treasurer.

Petition for writ of mandate to compel the state controller to draw his warrant for certain funds in the state treasury, deposited by the regents of the state university, and thereafter ordered drawn therefrom by resolution of the regents, in the form provided by statute.

John B. Mhoon for petitioner; Attorney General E. C. Marshal and J. M. Lesser for respondents.

By the COURT.—The funds and securities deposited by the regents of the university in the state treasury for safekeeping, may be drawn therefrom in the manner provided by the statute. The statutes which authorize the deposit provide how it shall be withdrawn. It is clear that the first clause of section 22, article 4, of the constitution was not intended to apply to these funds and securities.

Application denied.

CONKLIN v. STONE.

No. 8215; March 19, 1885.

6 Pac. 378.

Appeal.—On Failure of the Trial Court to Find on the Issues made by the pleadings in an action, the judgment must be reversed on appeal, and the cause remanded for a new trial.

APPEAL from the Superior Court of Monterey County.

S. W. Swinnerton for appellant; W. H. Webb, Jas. A. Wall, and N. C. Briggs for respondent.

By the COURT.—For a failure on the part of the court below to find on the issues made by the pleadings in the case, the judgment must be reversed, and the cause remanded for a new trial. So ordered.

MONROE v. COOPER.

No. 8692; March 19, 1885.

6 Pac. 378.

Appeal.—Where There are Conflicting Instructions on material issues in a case, the judgment will be reversed.

APPEAL from the Superior Court of the County of Monterey.

W. H. Webb and Jas. A. Wall for appellant; S. F. Geil and H. V. Morehouse for respondent.

ROSS, J.—Among other matters the defendant sets up in his answer that the plaintiff took his sheep under a contract of agistment, and that, by reason of negligence on plaintiff's part, a large number of the sheep perished, to defendant's damage, etc.

The fifth instruction given by the court below to the jury as follows: "If you should find from the evidence that plaintiff took and kept the defendant's sheep to supervise, care for, and pasture, for a compensation to be paid by defendant, the plaintiff thereby became and was the bailee of said sheep for defendant, and the law imposed on plaintiff the duty of properly supervising, caring for, and pasturing said sheep; and if any loss, damage, or injury occurred to said sheep while in the possession of plaintiff, the burden of proof is cast upon him to account for and to prove that such loss, damage, or injury was not owing to his negligence or want of care; otherwise he is liable to defendant for such loss, damage, or injury, and you should so find."

In the tenth instruction the court said: "I instruct you that the burden of proof to establish negligence is upon the party charging it (who was the defendant). It is not enough for him to prove that he has suffered loss by some event which happened, or by the act or omissions of the party charged; he must also prove that the party charged with negligence violated a duty resting upon him. He must prove facts from which it can be fairly inferred that the party's negligence caused the injury complained of. He is not bound to prove more than enough to raise a fair presumption of negligence on the part of the party charged, and resulting in injury to himself. Having done this he is entitled to recover, unless the party produced evidence sufficient to rebut the presumption."

The instructions quoted are in direct conflict upon an important question in the case, for which reason the judgment and order must be reversed and the cause remanded for a new trial. In the one, the jury was told that the burden of proof was upon the plaintiff to account for the loss of the sheep; in the other, that the burden was upon the defendant to show that the loss occurred through the negligence of the plaintiff.

Judgment and order reversed and cause remanded for a new trial.

We concur: McKinstry, J.; McKee, J.

HUGHES v. PARSONS.

No. 8609; March 19, 1885.

6 Pac. 380.

Appeal—Conflicting Evidence.—Findings of a Jury on material facts will not be disturbed where the evidence is conflicting.

Appeal—Erroneous Admission of Evidence.—Judgment will not be Reversed on the ground of erroneous admission of evidence, where such error resulted in a finding of nominal damages only, against the party claiming injury therefrom.

APPEAL from the Superior Court of the County of Monterey.

This was an action in ejectment, both plaintiff and defendant relying on prior possession to sustain his title.

S. F. Geil for appellant; W. H. Webb, J. A. Wall and H. V. Morehouse for respondent.

ROSS, J.—By the verdict rendered in this case the jury in effect found that the defendant entered upon the prior possession of the plaintiff of the disputed premises and dispossessed her. An examination of the evidence shows that it is substantially conflicting upon the question as to whether the land was in the actual possession of plaintiff or Conroy. The verdict in favor of the plaintiff must therefore be taken as conclusive of the question. The ruling of the court below in respect to the burning of the cabin and fencing resulted in no injury to the appellant, for the jury only awarded the plaintiff nominal damages. The ruling in regard to the question put to Conroy, if erroneous, was cured by his subsequent testimony to the effect that he had possession of the disputed premises from July, 1874, to the 1st of June, 1879. The instruction is not open to objection on the party of the defendant.

Judgment and order affirmed.

We concur: McKee, J.; McKinstry, J.

CARLSON and Others v. MUTUAL RELIEF ASSOCIATION.

No. 8198; March 23, 1885.

6 Pac. 395.

Appeal.—Where There is a Substantial Conflict in the Evidence on a material issue, the finding of the jury will not be disturbed.

A Verdict, if Justified by the Evidence, is not contrary to law.

Appeal—Harmless Error.—Reversal will not be Granted for errors in the admission of evidence which do not affect the substantial rights of the appellant.

APPEAL from the Superior Court of the County of Mendocino.

E. S. Lippitt for appellant; T. L. Carothers for respondents.

SHARPSTEIN, J.—Two of the grounds of the motion for a new trial in this case are that the evidence is insufficient to sustain the verdict, and that it is against law.

The action was brought by the heirs of Elizabeth Carlson, deceased, to recover the sum which it is alleged the defendant agreed to pay, on the death of the said Elizabeth Carlson, to her heirs. The plaintiffs' right to recover depends on deceased being a member of the defendant association at the time of her death. If previous to her death she paid all the assessments of which she had notice, then she was a member when she died. That was a question, and the only question, which the jury had to determine; and if there was any substantial conflict in the evidence on it, this court will not disturb the order denying the motion for a new trial.

The by-laws of the defendant provide that a member shall have twenty days within which to pay an assessment after notice of it; and if he do not pay within that time he may retain his membership by paying one dollar and twenty-five cents within the next twenty days. But if nothing be paid within forty days after the first notice, the person so in default ceases to be a member. Defendant's rules require all notices to be delivered to a member or sent by mail. In this case it is not

claimed that any notice was delivered. The insistence is that the notices to which the deceased was entitled were sent by mail. Defendant's secretary testified that his assistant, Mr. Gilbert, did the mailing. The latter, on his direct examination, stated that he duly mailed the notices to which deceased was entitled; but on being asked on his cross-examination if he could testify that he actually mailed any notices to Mrs. Carlson, the deceased, he answered, "No, I cannot." He further stated that he had no means of knowing whether the notices were received by the parties to whom sent.

The surviving husband of the deceased did not testify as clearly as we think he might have done in regard to the receipt of notices of assessments, but he certainly denied that notices of the unpaid assessments were received in the lifetime of the deceased. The defendant claims that the notices were duly mailed. It was incumbent on it to prove that they were; and the only person who was introduced to prove that fact said he could not testify to it.

It is too plain to admit of argument that this court, on evidence of such a character, cannot hold that the jury were bound to find that notices of the unpaid assessments were duly mailed to the deceased in her lifetime; a fortiori that the court erred in denying the motion for a new trial on the ground of insufficiency of the evidence to justify the verdict. If the verdict was justified by the evidence it was not against law. The notice sent out for Mrs. Carlson after her death, and the forwarding of money to the defendant by the husband, thereafter, were immaterial circumstances, and the admission of evidence to prove them could not, we think, under the charge and instructions of the court, have prejudiced the defendant. And as we cannot see that the error, if such it was, could possibly have affected the substantial rights of the parties, it is the duty of the court to disregard it.

Judgment and order affirmed.

We concur: Myrick, J.; Thornton, J.

DOGGETT v. BELLOWS and Others.

No. 8714; March 24, 1885.

6 Pac. 421.

Mechanic's Lien.—In an Action for the Foreclosure of a Mechanic's Lien, the complaint should aver the amount due under the contract to the contractor from the owner of the building on which the work was done.

APPEAL from the Superior Court of the County of Mendocino.

Action to foreclose a mechanic's lien by plaintiff, who was a laborer employed by defendant to work on a flume, under a contract by defendant with the Mendocino Flume & Mining Company.

E. T. Case for appellant; Gillespie & Hamilton for respondent.

By the COURT.—Action to foreclose a mechanic's lien. There is no averment in the complaint that any sum was due from the Mendocino Flume & Mining Company, the owner, to Bellows the contractor; therefore the demurrer of the company to the complaint should have been sustained: Latson v. Nelson, 11 Pac. C. L. J. 589; Whittier v. Hollister, 64 Cal. 283, 30 Pac. 846.

The judgment, so far as it concerns the Mendocino Flume & Mining Company, is reversed, and the cause is remanded with directions to sustain the demurrer above referred to.

REYNOLDS v. SUPERIOR COURT.

No. 9968; March 26, 1885.

6 Pac. 421.

Divorce—Judgment for Attorneys' Fees—Prohibition.—The enforcement of a provision in a judgment of divorce requiring defendant to pay counsel fees to plaintiff's attorneys cannot be restrained by a writ of prohibition, although the judgment was one of dismissal entered by consent of the parties.

Application for a writ of prohibition.

The petitioner's wife sued for a divorce, but pending the action she condoned the husband's offenses and returned to live with him, and by consent of the parties a dismissal of the action was asked for, upon which the court rendered a judgment of dismissal, providing in the judgment, however, on motion of plaintiff's attorney, that defendant should pay plaintiff's counsel fees, which the defendant, petitioner herein, failed to pay. Thereupon an order of contempt was issued, to prohibit which the application for this writ was made.

Langhorn & Miller for petitioner.

By the COURT.—Application for writ of prohibition. We see no ground for granting the writ prayed for in this case. The application is therefore denied.

JONES v. DESMOND and Others.

No. 8602; March 26, 1885.

6 Pac. 420.

Appeal—Findings not Sustained by the Evidence.—Where a finding is on a material issue, and there is no evidence to sustain it, the judgment will be reversed and a new trial ordered.

APPEAL from the Superior Court of the City and County of San Francisco.

M. Lynch for appellant; Clitus Barbour for respondents.

By the COURT.—The defendants allege and the court found that in the action of Brooks v. Swineford the plaintiff recovered a judgment for the sum demanded in his complaint. The allegation must be deemed to be denied by the plaintiff in this action; and it is assigned as error that the finding is not justified by the evidence. We are unable to find any evidence of the recovery of a judgment by the plaintiff in the action of Brooks v. Swineford. The finding is upon a material issue, and as there is no evidence to sustain it, there must be a new trial. No other material error is specified.

Judgment and order reversed.

ROSBOROUGH v. BOARDMAN.

No. 9947; March 27, 1885.

6 Pac. 449.

County Assessor of Alameda.—The California County Government Act of March 14, 1883, did not go into effect for the purpose of creating county offices until January 1, 1885, and therefore prior to that date there was no such office as county assessor of Alameda county.

Application for mandamus to compel the auditor of Alameda county to draw a warrant for payment of petitioner's salary as assessor of a county.

R. A. Redmond for petitioner; S. P. Hall, W. R. Davis and D. C. Robinson for respondent.

By the COURT.—If there was not, immediately preceding the date of the passage of the act to "establish a uniform system of county and township governments" (approved March 14, 1883), any such office as that of "county assessor of Alameda county," there is not any such office now, unless

it was created by some provision of that act; and if such an office was created by any provision of that act, such provision did not take effect prior to the first Monday after the first day of January, 1885, as clearly appears by section 181: "Any provision of this act, creating a county office in any county, shall not (except for election purposes) take effect prior to the first Monday after the first day of January, eighteen hundred and eighty-five": Stats. & Amend. Codes 1883, p. 365.

The petitioner's alleged appointment was made prior to the first day of January, 1885, and before any provision of the act of March 14, 1883, "creating a county office" in Alameda county, had taken effect. Petitioner, however, insists that the act of February 10, 1874, which abolished the office of county assessor of Alameda county and created township assessors therein, was repealed by section 4109, Political Code, which went into effect March 7, 1881. The later act does not expressly repeal the former; and, as we are unable to discover any repugnancy between the two, we cannot hold that there is a repeal by implication. As the right of the petitioner depends (1) on there being such an office as that which he claims to have been appointed to fill, at the date of his alleged appointment; and (2) on there being a vacancy in the office at that date—it follows from the foregoing that his application for a writ to compel the respondent to draw his warrant on the treasury for the payment of his (petitioner's) salary as "county assessor" must be denied.

Application denied.

EVANS v. BAILEY.

No. 8727; March 30, 1885.

6 Pac. 424.

Superior Court—Jurisdiction in Actions Against Stockholders.—A superior court has no jurisdiction of an action to recover from each of several stockholders of a corporation his proportion of a debt contracted by the corporation, where the amount sued for is less than three hundred dollars, though the aggregate amount sought to be recovered from the several stockholders be more than three hundred dollars.

APPEAL from the Superior Court of the City and County of San Francisco.

Action to recover from the appellant, and from several other stockholders of the California Fruit and Meat Shipping Company, the price of certain cattle delivered to such corporation, and for a several judgment against each of his proportion of the price of such cattle. The amount alleged to be due by appellants was less than three hundred dollars in each case, but the aggregate amount sought to be recovered exceeded that sum.

Estee & Boalt for appellants; A. B. Hunt, G. A. Heinlin and N. Sodenberg for respondent.

By the COURT.—As the plaintiff in his complaint fixes the liability of each of the appellants at less than three hundred dollars, it follows that the superior court did not have jurisdiction of the action: Derby v. Stevens, 64 Cal. 287, 30 Pac. 820.

Judgment reversed, with directions to the court below to dismiss the action as to appellants.

CRESCENT CITY MILL & TRANSP. CO. v. HAYES and Others.*

No. 8522; March 31, 1885.

6 Pac. 455.

Injunction Held not Warranted by facts stated in complaint.

APPEAL from the Superior Court of the County of Del Norte.

This was an application for an injunction to prevent defendants from draining the waters of a certain lake into the Pacific ocean, the complaint averring in substance that plaintiff

*In bank, Crescent City Mill etc. Co. v. Hayes (Cal.), 11 Pac. 319.

is a corporation engaged in the manufacturing, transportation, and sale of lumber; that its mills are located on the bank of said lake, and that it is necessary that a certain depth of water in such lake, which now exists, should be maintained, the same being essential to the conduct of plaintiff's business, and that a decrease of its depth would result in a great and irreparable injury to plaintiff.

W. A. Hamilton and J. D. H. Chamberlain for appellant; L. F. Cooper and R. G. Knox, for respondent.

By the COURT.—Appeal from an order refusing to dissolve an injunction. The original complaint filed in this cause, and on which alone the court ordered an injunction to issue, did not state facts sufficient to warrant the court in granting the writ, and the same should have been dissolved.

Orders reversed and cause remanded, with directions to grant the motion.

HOOK v. HALL.*

No. 8507; April 1, 1885.

6 Pac. 422.

New Trial—Time for Filing Notice of Intention.—In jury cases, notice of intention to move for a new trial must be filed and served on the adverse party within ten days after verdict, and the trial court or judge has no power to extend the time for filing such notice.[1]

Appeal from Order Granting New Trial—What Considered on.—The insufficiency of a complaint cannot be considered on an appeal from an order granting a new trial.

APPEAL from the Superior Court of Monterey County.

W. S. Dodge and H. V. Morehouse for appellant; J. Lee and A. S. Kittredge for respondent.

*For opinion in bank, see Hook v. Hall, 68 Cal. 22, 8 Pac. 596.

1 Cited in Burton v. Todd, 68 Cal. 487, 9 Pac. 664, where it is explained that the court may, nevertheless, extend the time, not exceeding thirty days, provided the statutory ten days have not gone by when it does so.

By the COURT.—This is an appeal by plaintiff from an order granting a new trial. The action was tried by jury. Section 659 of the Code of Civil Procedure provides that the party intending to move for a new trial must, within ten days after verdict, file with the clerk, and serve upon the adverse party, a notice of such intention. In the case before us, the notice of intention was filed more than ten days after the verdict. It does not affirmatively appear that the court below attempted to extend the time for filing or serving the notice, and when he filed amendments to the proposed statement, on motion for new trial, the plaintiff reserved his objection that notice of intention was not filed within statutory time. But the right to move for a new trial is statutory, and there is no provision of the Code of Civil Procedure which gives to the superior court or to the judge power by order to extend the time for filing a notice of intention to move for a new trial. Section 1054 does not authorize such an order. With respect to ordinary notices the proof of the service is filed with the clerk for preservation, but with respect to notices of intention to move for new trial the statute specifically requires that they must be filed within the ten days, as a prerequisite to any further proceedings toward obtaining a retrial. The insufficiency of the complaint cannot be considered on appeal from an order granting a new trial.

Order reversed.

KERNS v. DEAN.

No. 8041; April 28, 1885.

6 Pac. 704.

Vendor and Vendee—Contract for Sale of Land.—On authority of Kerns v. McKean, 65 Cal. 411, 4 Pac. 404, judgment reversed, and cause remanded for a new trial.[1]

APPEAL from the Superior Court of Santa Cruz County.

This action was brought with and at the same time as Kerns v. McKean, 65 Cal. 411, 4 Pac. 404, and involves the same question, based on the same facts as in that action.

[1] Cited in 77 Cal. 557, 19 Pac. 817, where the case is decided, after having been sent back in the first instance.

C. B. Younger for appellant; J. A. Barham for respondent.

By the COURT.—This action depends in the main on the same facts as Kerns v. McKean, 65 Cal. 411, 4 Pac. 404. No defense of the statute of limitations, or of another action pending between the same parties for the same cause, is here set up. The points involved herein are passed on in Kerns v. McKean, and determined adversely to the defendant in this cause.

The judgment is reversed, and the cause is remanded for a new trial.

THORNTON, J.—I dissent. In this cause a judgment was rendered in Department 2, and a rehearing was granted on a claim preferred by defendant that the cause should have been, in case judgment was reversed (as it was), remanded for a new trial. The defendant, to sustain his contention, urged that the facts were not properly found, and that on another trial he could prove such a state of facts as would demonstrate that the judgment should be in his favor. The appeal herein is on the judgment-roll alone. There is no statement or bill of exception and no facts before us, save such as are contained in the findings of fact. All the material issues were found upon, and the facts as found warranted a judgment for plaintiff as ordered by the department.

It is urged to sustain defendant's contention that, inasmuch as judgment passed for defendant, he could not move for a new trial. But if he was aggrieved by any finding of fact, he was entitled to move. Such is the language of the statute in regard to motions for new trials. By section 657, Code of Civil Procedure, it is enacted that "the former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved," etc. If the facts found, or any of them, on a material issue are not found in accordance with the evidence, is not the party aggrieved whether judgment is entered for him or not? We cannot see that he is not. In fact, that in such case he is aggrieved is manifest from the sixth subdivision of section 657, in which is enumerated as one of the causes for which a new trial may be granted, "insufficiency of the evidence to justify the verdict or other decision." The causes for which a new trial will be

granted and the grievances are commensurate. If the cause exists the party is aggrieved—and he is aggrieved because the cause exists. There is no such restriction on the party's right to have a new trial, that judgment has been rendered in his favor. The only restriction is that the cause is one "materially affecting the substantial rights of the party": Code Civ. Proc., sec. 657. If any material fact is improperly found—found against his contention, and without evidence sufficient to sustain it—he is aggrieved within the significance of the statute. The same words are used to designate a party entitled to prosecute an appeal: "Any party aggrieved may appeal," etc.: Code Civ. Proc., sec. 938. One not a party to the action cannot be a party aggrieved. Senter v. De Bernal, 38 Cal. 640. But when the statute has provided a mode of appeal, that must be followed, and within the time prescribed by law, or the appeal will be dismissed. Should not the same rule apply to a motion for a new trial?

The circumstance that the judgment has been erroneously rendered for the defendant, when it should have been for plaintiff, is a question of law, which defendant under the advice of counsel is bound to determine for himself. If he is satisfied to rest on it as rendered, he assumes the risk of having it reversed in the appellate court and a proper judgment entered. But he cannot, when judgment is so rendered by this court on error or appeal, be entitled to have the cause sent back for a new trial on the facts, without having taken the steps required. When any party is entitled by law to a new trial, he can procure it only, except where the court grants it on its own motion under section 662, Code of Civil Procedure, by giving notice of his intention to move for it within ten days after the verdict of the jury, or within ten days after notice of the decision of the court or referee (Code Civ. Proc., sec. 659), or such further time as the court in which the action is pending, or a judge thereof, may grant by an order extending the time, such extension not to exceed thirty days without the consent of the adverse party: Code Civ. Proc., sec. 1054.

Now, if a new trial is granted herein by this court, the provision of the statute must be entirely disregarded, and such new trial will be allowed when years have elapsed since

the expiration of the period designated within which notice of intention to move should have been given. In this case the decision was filed on the 29th of April, 1881. A new trial granted to defendant under such circumstances would not only be in violation of the statute (Caney v. Silverthorne, 9 Cal. 67; Wing v. Owen, 9 Cal. 247), but might result in great hardship to the plaintiff. It must be remembered that the provision in relation to new trials is one having no existence outside of the provisions of the Code of Civil Procedure, and, to entitle a party to it, he must bring his application within those provisions.

Again, it has been invariably held that where the evidence is conflicting, neither the verdict of the jury nor the findings of the court will be disturbed. It has been so held uniformly from the beginning in this state—from Johnson v. Pendleton, 1 Cal. 132, to the last case of conflicting evidence in which the point was made. Who can tell whether in this case there was not a conflict of evidence? No evidence is before us, and, inasmuch as the court had jurisdiction, we are bound to presume, to sustain its action, that the court below committed no error in this regard, and that, on the evidence before it, the court properly found the facts.

The mode of trial adopted in this case by finding the facts was intended to avoid the necessity of moving for a new trial. As was said by Sanderson, J., speaking for the court in Tewksbury v. Magraff, 33 Cal. 247, "the finding should contain all the facts disclosed by the evidence which, in the judgment of counsel on both sides, have any bearing upon the question as to what the judgment should be. Unless it does, it is no better than a general verdict, and wholly fails to accomplish the object intended, which is to obviate the necessity of a motion for a new trial and a preparation of a statement of the evidence preliminary to an appeal. In a vast majority of cases there would be no occasion for a motion for a new trial, and, as incidental thereto, for the trouble, labor, and expense of getting up a record upon which the motion is to be heard, if the findings were what they are designed to be, and what they ought to be; for in nine cases out of ten, where the trial is by the court, the sole controversy here is as to whether the conclusions of law are correct. In all such cases

there should be, and there certainly need be, no occasion for a motion for a new trial, or for bringing the evidence to this court in any form." Limiting the findings to the material issues joined, the above remarks are correct.

There is another mode in which the defendant might have had the facts reviewed in this case, viz., by appealing from the judgment within sixty days after its rendition (Code Civ. Proc., sec. 939), and annexing a statement of the case to the record showing that the decision was not sustained by the evidence. This was not done herein. We cannot see how the defendant was entitled to have a new trial, under the laws of this state, when he has failed to adopt the mode of showing his right thereto prescribed by the statute regulating the subject. There having been no motion for a new trial, and the appeal not having been presented to us so as to review the facts under section 939, Code of Civil Procedure, the defendant cannot here question the facts found: Gay v. Moss, 34 Cal. 135.

I am of opinion that the judgment of Department 2 is correct, and should stand as the judgment of the court.

SPENCER v. HOUGHTON.*

No. 8162; April 29, 1885.

6 Pac. 853.

Guardian—Release of Surety.—Where the defendant became a surety in place of a surety on the former bond of a guardian, he and the other sureties on the former bond became joint obligors, though their contracts were contained in different instruments; and under the law, as it existed in California in 1871, a release of one of the joint obligors released all the co-obligors, and therefore, under an order releasing all the obligors on the former bond, but not including the defendant in the release, his liability ceased at the time of such release, and he cannot be held liable for any subsequent defalcation.

*For opinion in bank, see Spencer v. Houghton, 68 Cal. 82, 8 Pac. 679.

APPEAL from the Superior Court of the City and County of San Francisco.

John Reynolds for appellant; Taylor & Haight for respondent.

MYRICK, J.—Action against a surety on a guardian's bond. The points made by the surety on this appeal may be resolved into three, viz.: (1) The defendant was released and discharged of all liability; (2) there has been no legal ascertainment by the probate court of the amount due from the guardian; (3) the action is barred by the statute of limitations.

While the plaintiff, Josephine M. Spencer, was a minor (then Josephine M. Richardson), W. Harney was the guardian of her person and estate. In 1870 he was discharged as such guardian, and H. M. Hastings was appointed in his stead, and after qualifying Hastings received from Harney ten thousand dollars and upward, property of the ward. Hastings' bond was in the sum of twenty-eight thousand dollars, with E. B. Mastick and A. A. Cohen as sureties (jointly and severally with Hastings) in the sum of fourteen thousand dollars, and with H. P. Livermore and H. H. Haight as sureties (jointly and severally with Hastings) in the sum of fourteen thousand dollars. On the 14th of September, 1871, Livermore filed a petition in the probate court to be discharged from liability for future acts of his principal, and such proceedings were had that (on waiver by Hastings of service of citation) the court made an order that said Hastings give other security in place of Livermore, as prayed for in said petition. On the 21st of September, 1871, and in pursuance of such order, said Hastings and the defendant herein, S. O. Houghton, executed a bond to said ward by which, after reciting the facts of the execution of the former bonds, the petition of Livermore, and the order for other security, they bound themselves, Hastings as principal and Houghton as surety, in the place and stead of Livermore, jointly and severally, in the sum of fourteen thousand dollars, portion of the sum of twenty-eight thousand dollars; the condition of the bond being that if said Hastings, as guardian, faithfully execute the

duties of his trust according to law, the bond should be void, else to remain in full force and effect. On the tenth day of January, 1872, the said H. H. Haight filed a petition praying to be released from all responsibility on account of future acts of said Hastings, and such proceedings were had (Hastings having waived service of citation) that on the same day the court made an order that said Hastings file another bond in the sum of twenty-four thousand dollars, it then appearing that the personal estate of the ward did not exceed twelve thousand dollars. Hastings accordingly, on the 19th of February, 1872, filed a bond in the sum of twenty-four thousand dollars, with sureties as follows: S. A. Hastings and B. S. Brooks, jointly and severally, in the sum of six thousand dollars, portion of said sum of twenty-four thousand dollars; John Currey and T. I. Bergin, jointly and severally, in the sum of six thousand dollars, portion as aforesaid; S. W. Holladay and H. K. W. Clarke, jointly and severally, in the sum of six thousand dollars, portion as aforesaid; and Earl Bartlett and J. H. Smyth, jointly and severally, in the sum of six thousand dollars, also portion as aforesaid. Upon the approval of this bond an order was made by the probate court that said Mastick, Cohen, and Haight, sureties on the former bond, be released from all responsibility for the future acts of the guardian. The name of the defendant, Houghton, was not included in this order. On the 18th of October, 1877, after the said Josephine had attained majority, she executed to Haight, Mastick, and Livermore an instrument acknowledging the receipt from them of fifteen hundred dollars, and releasing them from all liability on the bond executed by them. On the 10th of September, 1877, she executed a like release to A. A. Cohen, acknowledging the receipt of five hundred dollars.

The said Hastings departed from this state in the fall of 1872, and never returned. The said Josephine attained majority, February 11, 1874. The said Hastings having failed to file an account, the said court, on the 25th of March, 1878, on petition of the said Josephine, made an order that said Hastings file an account within thirty days after service on him of such order. No citation was issued, but a copy of the order was served upon Hastings on the 10th of April, 1878, at the city of Washington. Hastings did not file an

account, and has never complied with the requirement of said order. After thirty days from the said service, the said Josephine, by her attorney, prepared an account from the records and papers on file in the probate court in said case, and filed the same, and petitioned the court that the same be allowed as and for the account of said Hastings. The said court thereupon fixed a day for the settlement of the account, and directed notice thereof to be given by posting. On the day fixed, the court appointed a referee to examine and revise the account, and after examination and the hearing of the evidence of witnesses produced by the said Josephine, the referee reported that there was a balance of six thousand twelve dollars in favor of said Josephine due from said Hastings, and the court thereupon made an order settling the account as and for the final account of said Hastings, guardian, at the said sum of six thousand and twelve dollars.

Before the commencement of this action, plaintiff forwarded to Hastings a certified copy of the order settling the account, and demanded of him payment of the said sum due, but he refused and neglected to pay the same, or any part thereof. After the said Josephine attained majority, she executed releases to several of the sureties, for the consideration of five hundred dollars each, viz.: September 10, 1877, to A. A. Cohen, and October 18, 1877, to H. H. Haight, E. B. Mastick and H. P. Livermore. It appears from the report of the referee that other sureties paid to Josephine the sum of five hundred dollars each, viz., T. I. Bergin, S. W. Holladay, Earl Bartlett, H. K. W. Clarke, B. S. Brooks and S. A. Hastings.

1. The defendant claims that the release by plaintiff of Mastick, Cohen and Haight was a release of him, the defendant, on the ground that the release of one or more joint obligors is a release of all. Since the date the codes went into effect (January 1, 1873), it has been and is the law of this state (section 1543, Civil Code) that a release of one of two or more joint obligors does not extinguish the obligation of any of the others, unless they are mere guarantors; nor does it affect their right to contribution. Prior to that day, it was the law that a release of one joint or joint and several obligor or debtor released the others (Prince v. Lynch, 38 Cal. 531, 99 Am. Dec. 427), unless the instrument of release contained words to show an intent that it should be less than a full release of the party

released. Whether this change in the law affects the obligations of any of the sureties (the bond in suit being executed before the code) I express no opinion.

Under the statute of this state which existed prior to the code (section 39 of the act concerning guardians), the probate judge might require a new bond to be given by a guardian whenever he might deem it necessary, and might discharge the existing sureties from further liability. In accordance with that authority, the probate judge on the 10th of January, 1872, made an order that Hastings file another bond, in the sum of twenty-four thousand dollars, double the then value of the personal estate of the ward; and such bond was accordingly executed, and was approved and filed. The judge made an order releasing the other sureties, but such order did not contain the name of Houghton. It therefore remains to be seen if Houghton was a joint obligor with the sureties whose names were mentioned. It was held in Dering v. Earl of Winchelsea, 1 Cox, 318 (White & T. Lead. Cas. Eq. 100), in regard to contribution, that it made no difference whether the sureties had signed the same or different instruments; that the real question was, Had they contracted with the principal to become liable for the same fund? and if so, equity would reach through the form, and would regard them as joint obligors. The same view is taken in the notes of Hare and Wallace, commencing on page 134.

It may be added that by an act passed March 27, 1857, supplementary to the guardian act, sections 78 to 87 of the probate act were made applicable to guardians; and under those sections the probate judge had authority to accept a surety in the place of any of those in a former bond, and to release the surety whose place was thus supplied. These sections, and the action of the probate judge in approving the bond of Houghton and discharging Livermore, are of materiality as to the suggestion that, but for these sections, the discharge of Livermore acted as a discharge of Haight, Mastick, and Cohen. If there had been defalcation by Hastings before February, 1872, and Houghton had been compelled to pay the amount, he could have enforced contribution from Cohen, Mastick and Haight. That being so, it follows there was a joint liability; and it also follows, under the law then existing, that the taking of a new bond, and the release of Cohen,

Mastick and Haight by the judge in February, 1872, released Houghton, at least from liability for any defalcation thereafter to occur. It does not appear that any defalcation occurred prior to that time; on the contrary, it would seem from the order of the probate judge that the guardian then had the personal estate of the ward in hand. The new bond, when given, was to take the place of the old, at least as to future acts, and the new sureties were to be liable therefor.

Since the codes went into effect the plaintiff has received from the sureties named in the first bond, and from those named in the last, sums aggregating seven thousand dollars, and has released them; but whether under section 1543, Civil Code, above referred to, this affects the question before us, I express no opinion. The purpose of the present suit is to hold Houghton for the whole of the balance claimed to be unpaid, six thousand and twelve dollars, and interest thereon. For the reasons given above I am of opinion that the taking of the new bond, and the discharge by the probate judge of his co-obligors, released the defendant, Houghton, as to any defalcation thereafter to arise: People v. Buster, 11 Cal. 215. It may be added that for any liability on the part of Livermore arising during the time he was surety the plaintiff received compensation and executed a release; that the defendant, Houghton, was liable for defalcation occurring from September 21, 1871, to February 19, 1872, and there is nothing to show that any defalcation occurred between those days. The action is not based on a defalcation occurring during that time.

From the views above expressed, I do not deem it necessary to consider the other points presented.

Judgment and order reversed and cause remanded for a new trial.

THORNTON, J.—Houghton became a cosurety with Haight on the 21st of September, 1871, and continued so to be until the taking of the bond with eight sureties on the 19th of February, 1872, when Haight was discharged by order of court from all future defaults of the guardian. It appears that Haight (Houghton's cosurety) was released, for a sum paid in 1877, by the ward (plaintiff here), who had then attained her majority. Did not this release Houghton? It is said

it did not, because at that time the Civil Code was in force, and it was provided by section 1543 that "a release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from him." Does this section apply to the case of sureties? We are inclined to think it does not: See Civ. Code, secs. 2819, 2840. But in the view we take of the case, it is unnecessary to decide it.

Conceding that section 1543, Civil Code, would apply to sureties in case the bond in question had been taken after the code went into effect, as the bond was taken prior to that time, we are of opinion that it does not affect it. The right to have contribution from his cosurety, Haight, should he be compelled to pay, vested in Houghton when he became joint surety with Haight in 1871. This right accrued to and vested in Houghton at the time he became a joint surety with Haight, on the happening of the event mentioned above, though the event had not happened; and of this right he could not be devested by any subsequent legislation. The right above mentioned vested in Houghton by virtue of his contract of cosuretyship, and this obligation could not be impaired by any subsequent act of the legislature.

We are of opinion that the release of Haight, in 1877, released Houghton. Further, Houghton was a joint surety with the eight sureties, to the extent of fourteen thousand dollars. The ward, after attaining her majority, in 1877 and 1878, for sums paid, released several of these eight sureties. This released Houghton by operation of law. We are further of opinion that the decree or order of the probate court, made in 1878, adjudging the amount due by the guardian, did not bind the sureties. Hastings, the guardian, never had notice of this proceeding, and therefore the sureties were not bound. The service of the order of the court, made on Hastings in Washington city, was no service. Such service could only be made by citation (Code Civ. Proc., secs. 1707, 1708, 1709), and here it appears that no citation was issued, but an order was made by the court and directed to be served.

It is said that Hastings had left the state at the time that it became essential to notify him, and that therefore the citation could not be served on him; and, further, that it is provided in section 1710, Code of Civil Procedure, that "when

personal notice is required, and no mode of giving it is prescribed in this title, it must be given by citation," and as there could be no personal service, the person to be cited having left the state, citation was not required. We are of the opinion that service could be made in a mode provided by law. By section 1709, Code of Civil Procedure, it is declared that "the citation must be served in the same manner as the summons in a civil action." A summons in a civil action can be served on a person who has departed from the state, by publication (sections 412, 413), and by section 1709, above quoted, a citation can be served in the same way. The mode of procedure under this statute for serving summons by publication, where a person has departed from the state, or resides out of the state, etc., is applicable to the service of a citation by publication.

As to what is enacted in section 1710, Code of Civil Procedure, its meaning is that where actual service is directed to be made on the party personally, and not by publication, it must be made by citation. This is not inconsistent with service of a citation by publication in a case where the party to be served has departed from the state, or resides out of it. The two sections, 1709 and 1710, may thus be readily reconciled. It certainly could not have been the intention of the legislature to say in one section that a citation can be served by publication, and in the next that a citation could only be served by actual personal service.

From what has been said above, our conclusion is that the settlement of the account by the probate court, having been made without notice to the guardian, was not binding on Houghton, and was not admissible in evidence against him. It results from the foregoing that the judgment must be reversed and the cause remanded for a new trial; and it is ordered accordingly.

We concur: McKinstry, J.; McKee, J.; Morrison, C. J.

Sharpstein, J., took no part in the consideration of this cause.

OLIVER, Administrator, etc., v. BLAIR and Others.*

No. 8809; April 30, 1885.

6 Pac. 847.

Decree—Allegations of Complaint to Support.—Where a complaint alleges that certain defendants were the owners of stock, and that they transferred the same for certain purposes to another, who, in turn, in fraud and violation of the agreement under which he received the stock, transferred the same to the appellant, who, having full knowledge of the facts, threatened to sell such stock, a decree as to him, enjoining the sale or the offering for sale of such stock, and directing that he return and deliver the same in specified amounts to persons named, is justified by the allegations of the complaint.

APPEAL from the Superior Court of the City and County of San Francisco.

W. S. Goodfellow for appellant; W. M. Pierson, A. Compte, Jr., and Joseph Napthaly for respondent.

MYRICK, J.—This appeal is by the defendant Coubrough alone. He was made a party to the suit, and was served with summons, but did not answer. The decree, as to him, enjoined the sale, or offering for sale, of forty thousand one hundred and twenty shares of certain stock, and directed that he return and deliver the said stock in specified amounts to persons named. Coubrough alone is interested in the question before us. We have only to see if the decree is beyond the allegations and prayer in the pleadings. The complaint alleged that Collycott, Adams, and Shoenbar were the owners of certain stock, and that for certain purposes, under agreement, they transferred the same to Blair, who, in violation of the agreement, transferred the same to Coubrough, the latter being Blair's agent, and having full knowledge of the purposes for which it had been transferred to Blair; and that Coubrough threatened to sell the stock. We think sufficient appears in the complaint which, taken as confessed by Coubrough, justified the decree.

Judgment affirmed.

We concur: Sharpstein, J.; Thornton, J.

*For subsequent opinion, see 8 Pac. 612, post, p. 564.

SMITH v. DUNN.

No. 11,062; May 8, 1885.

6 Pac. 848.

Mandamus—Application to Superior Court Before Supreme Court.—Where, on an application for a writ of mandate before the supreme court, no reason is shown why the application was not made in the first instance to the superior court, the application will be denied.

Application for mandamus.

J. S. Sprague for petitioner.

See Smith v. Dunn, 68 Cal. 54, 8 Pac. 625.

By the COURT.—No sufficient reason appearing why the application for the writ of mandate was not made in the first instance to the superior court, the application to this court is denied.

SHUFFLETON v. HILL.

No. 8650; May 15, 1885.

7 Pac. 7.

Lien on Logs—Effect of Advancements to Defeat.—A mechanic having a lien on logs cut by him does not lose it because of advancements made on the property by another, under a contract of purchase, but he is entitled to enforce his lien against such property.

APPEAL from the Superior Court of Humboldt County.

Action by plaintiff to enforce his lien for labor on logs cut by him, and owned by the defendant.

S. M. Buck for appellant; W. H. Brumfield and James Hanna for respondent.

By the COURT.—We are of opinion that, under the contract and lease, Greenlaw, in the first instance, and Hill, as

his successor, owned the logs until delivery in the boom at the mill. Such being the case, plaintiff was entitled to an enforcement of his lien, irrespective of advances made by Vance to Hill.

Judgment reversed, and cause remanded, with instructions to enter judgment for plaintiff.

PEOPLE v. POWELLSON.

No. 20,053; May 21, 1885.

7 Pac. 35.

Prostitution—Enticement of Female.—Conviction held not sustained by the evidence.[1]

APPEAL from the Superior Court of the City and County of San Francisco.

Defendant was convicted in the lower court of enticement of female for purpose of prostitution.

C. B. Darwin for appellant; E. C. Marshall, attorney general, for respondent.

By the COURT.—The defendant was charged by indictment with taking, from certain individuals having the legal charge of her person, a female under the age of eighteen years, for the purpose of prostitution, under section 267, Penal Code. There was no evidence that the infant was taken from the charge or custody of the persons named in the indictment.

Judgment and order reversed, and cause remanded for a new trial.

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[1] Cited and followed in People v. Flores, 160 Cal. 766, 118 Pac. 248, where the girl alleged to have been enticed was proved not to have been under a parent's charge or custody at the time, but, on the contrary, a street-walker.

BRYANT v. BANK OF CALIFORNIA.

No. 7701; May 22, 1885.

7 Pac. 128.

Supplemental Proceedings—Mode of Procedure.—As proceedings supplementary to execution are purely statutory, the mode of procedure thereon provided for by statute must be followed; and a failure to comply with the statute will vitiate the proceedings.

Supplemental Proceedings—Record as Evidence in.—A judgment creditor, in a supplementary proceeding against a garnishee, brought in pursuance of an order made under the statute (Code Civ. Proc., sec. 720), must aver and prove the existence of the order and of the proceedings by which the order was founded. The record of such proceedings, to be admissible in such action, must be filed with the clerk of the court, and must come, either as an original or authenticated copy, from the hands of the officer in whose custody it is kept.[1]

APPEAL from the Superior Court of the City and County of San Francisco.

Wilson & Wilson for appellant; L. E. Bulkely for respondent.

McKEE, J.—On the 1st of May, 1877, the plaintiff, A. S. Bryant, recovered a money judgment, by confession, against J. M. Quimbie, upon which an execution was issued, and put in the hands of the sheriff of the city and county of San Francisco for collection, according to law. While the execution was in the hands of the officer, unlevied and unsatisfied, in whole or in part, Bryant claims to have commenced proceedings, supplementary to execution, for the examination of the judgment debtor as to his property, and against A. J. Ralston, William Sharon, Thomas Brown and D. O. Mills as garnishees, which resulted, as it is alleged in the judicial order authorizing the institution of a suit against A. J. Ralston and the Bank of California, garnishees, for the recovery of certain moneys which, as it is claimed the testimony of the garnishees

[1] **Cited** and distinguished in Collins v. Angell, 72 Cal. 515, 14 Pac. 136, where the execution had been returned unsatisfied, wherefore the plaintiff was entitled to the order without any affidavit, as provided in section 714 of the Code of Civil Procedure.

discloses, were deposited with the Bank of California by the judgment debtor in the year 1876; and it is by virtue of that alleged order that the plaintiff commenced the action in hand.

The complaint contains specific averments of proceedings, supplementary to execution, in the case of Bryant v. Quimbie. Issue was taken upon it, by specific denials of each of its averments. On the trial the plaintiff, for the purpose of proving compliance with the law under which the alleged supplemental proceedings were taken, and which resulted in the order authorizing the institution of the suit, offered in evidence the papers constituting the proceedings. These consisted of certain affidavits, made by the attorney for Bryant (the orders thereon purporting to have been signed by the judge of the court) for the examination of the judgment debtor and of the other persons named as garnishees, certain papers purporting to contain the testimony of the judgment debtor and garnishees, taken pursuant to said orders, and the final order, predicated upon that testimony, purporting to have been signed by the judge of the court, authorizing the plaintiff to sue. Each of these papers was entitled in the case of Bryant v. Quimbie; but to each and all of them, when offered in evidence, the defendant objected, on the grounds that they constituted no part of the record of the case of Bryant v. Quimbie, and did not come from the files of the court, but came from the custody of the attorney for the plaintiff, and that they were incompetent, irrelevant, and immaterial. The objections were overruled; and the ruling is assigned as error.

As matter of fact, not one of the papers offered in evidence was indorsed filed, nor does the record show that any of them were produced from the custody of the clerk of the court in which the order authorizing the suit purports to have been rendered. Affirmatively, it does appear that they all came from the custody of the attorney of the plaintiff; and, assuming that the judgment debtor, as defendant in the original action, had notice of the proceedings in the action supplementary to execution, in which an order was made which operated in law to transfer his interest in certain property for the satisfaction of the judgment, the question arises, Had the judge of the court, upon the papers in evidence, jurisdiction to make the order?

It may be conceded that an order, made under section 720, Code of Civil Procedure, authorizing a suit to be brought against a garnishee, cannot be questioned for any irregularity in the proceeding, and that, if made in the exercise of a proper jurisdiction, put in motion according to law, it is conclusive in a suit brought in pursuance of it; but, as it is by virtue of the order that the suit is instituted, it is incumbent on the plaintiff in the suit to aver and prove the existence of the order, and of the proceedings upon which the order was founded: 1 Greenleaf on Evidence, sec. 511. Without the proceedings the order would be a nullity, and without the order the action could not be maintained. It is the order which, as the legal result of the proceedings, operates as a judicial assignment to the judgment creditor of the right or interest of the judgment debtor to the property in the hands or subject to the control of the garnishee; and to produce that legal effect the proceedings must have been taken, and the order made, within the jurisdiction of the court before whom they purport to have been taken, and by whom the order purports to have been made. If the court had no jurisdiction of the proceedings, it had no jurisdiction to make the order. To the validity of all judicial proceedings, jurisdiction is indispensable.

Now, a proceeding supplementary to execution is entirely statutory: Hassie v. G. I. W. U. Cong., 35 Cal. 378. It is a separate proceeding in an original action, in which the court where the action is pending is called upon to exercise its jurisdiction in aid of the judgment in the action; and, as the statute which gives the remedy prescribes the mode of procedure, the mode must be followed. Unless the requirements of the statute are complied with, the proceeding cannot be sustained: McDonald v. Vinette, 58 Wis. 620, 17 N. W. 319; Demeritt v. Estes, 56 N. H. 315; Bloom v. Burdick, 1 Hill (N. Y.), 130, 37 Am. Dec. 299; People v. Spencer, 55 N. Y. 4; Bryan v. Smith, 10 Mich. 229; Ransom v. Williams, 2 Wall. 313, 17 L. Ed. 803.

Sections 715 and 717, Code of Civil Procedure, provide that supplementary proceedings shall be commenced by affidavits, which must contain the requirements of the section of the code under which they are made. Such an affidavit takes the place of a creditors' bill in chancery (Adams v.

Hackett, 7 Cal. 201; McCullough v. Clark, 41 Cal. 298; Pacific Bank v. Robinson, 57 Cal. 520, 40 Am. Rep. 120), and, as the legal substitute for that procedure, it must not only contain the necessary averments to give the court jurisdiction over it, but it must also be filed in the court, or delivered to the clerk for that purpose. Until the proceeding is thus commenced, it has no legal existence to set in motion the jurisdiction of the court to make the necessary orders for the examination of the judgment debtor or garnishee in aid of the judgment; there is nothing upon which the judge of the court can judicially act.

It is the proceeding, from its initial point in the making and filing of the requisite affidavit until its final completion in the judicial order for the institution of a suit against the garnishee, which becomes a judicial record as to the matter in question (Code Civ. Proc., sec. 1904); and, as such, it must be filed with the clerk of the court, and be lodged in the custody of the court; and, to be admissible as evidence of a judicial order, it must come from the hands of the officer in whose custody it is kept as a record of the court, either as an original or authenticated record: Sec. 1905, supra. "Nothing can be borrowed ex visceribus judicii until the original is proved to have come from the proper court": 1 Greenleaf on Evidence, sec. 508.

The papers offered, and admitted in evidence over the defendant's objections, were not a record. They were not original papers filed in the cause in which the proceeding purports to have been taken; they were not found in the place where such a record is kept, nor were they in any way authenticated as a record of the court. Hence jurisdiction to make the orders purporting to have been made for the examination of the judgment debtor, and of the alleged garnishees, as to the property of the judgment debtor did not attach; and the proceeding and orders made, including that which authorized the institution of the action in hand, were void: Day v. Brosnan, 6 Abb. N. C. (N. Y.) 312. Being void, the defendant in this action was not bound to move to vacate the order; it was as though it had never been made; and it attained no validity by reason of the omission of anyone, against whom it might be operative if valid, to vacate or set it aside. Nor was there any record upon which any party aggrieved could

appeal. The ruling of the court in admitting the papers in evidence was therefore erroneous.

Judgment and order reversed, and cause remanded for further proceedings.

ROSS, J.—Inasmuch as no notice to the judgment debtor of the proceeding authorized by section 720 of the Code of Civil Procedure is provided for, I am of opinion that that section which purports to authorize the judge, by order, to permit the judgment creditor to institute and maintain an action against the alleged debtor of the judgment debtor is unconstitutional and void. This, not only for the protection of the rights of the judgment debtor, but also for the protection of those of his alleged debtor, who might otherwise be compelled to pay twice. For this reason I concur in the judgment.

I concur: McKinstry, J.

SMITH v. SAN FRANCISCO.

No. 11,023; May 23, 1885.

7 Pac. 37.

Appeal—Dismissal for Failure to File the Transcript in Time.—Statement having been settled more than forty days before the transcript of record was served and filed, time to file the same not having been extended, and no transcript having been served or filed until notice to dismiss the appeal had been served and filed, appeal ordered dismissed.

APPEAL from Superior Court of the City and County of San Francisco.

John Lord Love for appellant; McAllister & Bergin for respondent.

By the COURT.—It appearing that the appeal herein was perfected and the statement settled more than forty days

before the transcript of the record was served and filed, and the time to serve and file said transcript not having been extended by stipulation or by order of the court, and no transcript having been served or filed until after the notice to dismiss the appeal herein had been served and filed, it is ordered that said appeal be, and the same is, hereby dismissed.

Thornton, J., dissenting.

SAWYER v. SARGENT.

No. 9840; May 28, 1885.

7 Pac. 120.

Landlord and Tenant—Adverse Possession by Tenant.—A tenant is estopped to deny his landlord's title, and such estoppel continues, not to the end of his term merely, but to the end of his possession; or, where there has been a repudiation of the tenancy, and a consequent adverse holding by the tenant, until the statute of limitations has run in his favor; and such an adverse possession cannot be set up without a surrender of possession as tenant.

APPEAL from the Superior Court of San Diego County.

Works & Titus for appellant; Wm. M. Smith for respondent.

ROSS, J.—The court below found, and there was evidence sufficient to sustain the finding, that the defendant entered into possession of the demanded premises under a written lease from the plaintiff and one Thomas, and that prior to the commencement of this action, which is ejectment, the term of the lease expired. There is nothing in the case to take it out of the general rule that a tenant cannot dispute his landlord's title. The estoppel, as said in Tewksbury v. Magraff, 33 Cal. 244, "continues, not to the end of the term merely, but to the end of the tenant's occupation; or, where there has been a repudiation of the tenancy, and a subsequent adverse holding by the tenant, until the statute of limitations has run in his favor. He cannot set up an adverse title which

he may have acquired. Before he can avail himself of such a title he must surrender the possession."

It is not necessary to determine other questions discussed by counsel.

Judgment and orders affirmed.

We concur: McKee, J.; McKinstry, J.

HITE GOLD QUARTZ CO. v. STERMONT SILVER MIN. CO.

No. 8746; May 28, 1885.

7 Pac. 120.

Appeal.—Appellant Having Failed to File Points and Authorities within the time allowed, judgment affirmed.

APPEAL from the Superior Court of Mariposa County.

L. F. Jones for respondent; W. H. L. Barnes for appellant.

By the COURT.—It appearing that appellant has failed to file points and authorities within the time granted for that purpose, it is ordered that the order appealed from be affirmed.

PEOPLE ex rel. LEVERSON and Others v. THOMPSON.

No. 9846; May 28, 1885.

7 Pac. 142.

Legislature—Manner of Reading Bills.—Under the Provision of the California constitution, article 4, section 15, which requires that every bill shall be read on three several days in each house, it is not required that the bill shall be read on three several days after an amendment thereto.[1]

[1] **Cited** in Smith v. Mitchell (W. Va.), 72 S. E. 756, as authority for saying: "When a bill is amended, it does not call for re-reading."

Application for mandamus to compel defendant, the Secretary of State, to count and estimate the votes cast for representatives to Congress at the last regular election.

M. R. Leverson, G. W. Chamberlain and E. C. Marshall, attorney general, for petitioners.

ROSS, J.—The real ground of the petitioner's objection to the act of the legislature of March 13, 1883, entitled "An act to divide the state of California into congressional districts," is that the bill was not read on three several days in each house after amendment. The constitution in terms requires that every bill shall be read on three several days in each house, unless in case of urgency such reading be dispensed with as provided for: Const., sec. 15, art. 4. And it has already been held here that when the constitution says the bill shall be read, it means that it shall be read at length (Weill v. Kenfield, 54 Cal. 111); that is to say, it shall be read at length in its then condition. The constitution makes express recognition of the fact that a bill may be amended in either house, but does not provide for a reading thereof in each house on three several days after amendment. "Any bill may originate in either house, but may be amended or rejected by the other": Sec. 16, art. 4, supra. If petitioners' claim be well founded, a bill which originated in the assembly, for example, and was there properly read on three several days and regularly passed and sent to the senate, should in the latter body be amended and properly passed, it would have to be again read in the assembly on three several days. We find no warrant in the constitution for such a claim. If the framers of that instrument had intended to require a reading in each house on three several days of every bill after amendment, it would have been an easy matter to have said so, and as the provision with respect to the passage of bills is extremely explicit, it is fair to presume that there was no such intention on the part of the constitutional convention. We have thought it best to dispose of the petitioners' application for the writ upon the merits, rather than upon technical objections that might otherwise be in the way of granting it.

Writ denied and petition dismissed.

We concur: McKinstry, J.; McKee, J.

MERCED CO. v. HICKS and Others.

No. 9599; June 3, 1885.

7 Pac. 181.

Judgment—Vacation When No Service of Summons.—Where a judgment is vacated because the defendants had not been served with summons, nor had appeared in the action, a refusal to make an order that the respondents should answer the complaint is not error.

APPEAL from the Superior Court of the County of Merced.

Frank H. Farrar and Henry Edgerton for appellants; R. H. Ward for respondents.

By the COURT.—If, as we held in Merced Co. v. Hicks, 67 Cal. 108, 7 Pac. 179, the order vacating the judgment against the respondents was properly made on the ground that they had not been served with summons or appeared in the action, it necessarily follows that the refusal to make an order that said respondents should answer the complaint was not error.

Order affirmed.

AH GOON v. TARPEY and Others.

No. 8633; June 3, 1885.

7 Pac. 188.

Appeal—Immaterial Variance.—Reversal is not Warranted by variances between allegations and proof which are immaterial, if no one is misled thereby.

APPEAL from the Superior Court of the City and County of San Francisco.

A. A. Moore and Moore & Reed for appellants; T. C. Van Ness for respondent.

By the COURT.—1. The difference in the names Ah Yak and Ah Jack; also as to whether the men were employed to be paid one dollar, or a dollar and a quarter, or a dollar and a half; and the statement in the assignment that the contract was with the Melrose Smelting & Refining Works—if variances, were immaterial, and misled no one: Code Civ. Proc., sec. 469.

2. The court did not err in striking out that portion of the answer relating to garnishment; it contained no defense to the action stated in the complaint.

Judgment and order affirmed.

O'CONNOR and Others v. FLYNN.

No. 8947; June 3, 1885.

7 Pac. 188.

Appeal.—Reversal is not Warranted by Error which is favorable to the appellant.

APPEAL from the Superior Court of the City and County of San Francisco.

The decision on a prior appeal is reported in 57 Cal. 293.

Sawyer & Ball and M. G. Cobb for appellants; Jos. W. Winans for respondent.

SHARPSTEIN, J.—On the former appeal this court directed the court below to order an accounting, and with great minuteness directed in what manner the account should be taken. From that direction the only deviation which we have been able to discover was made in the interest of appellants.

Judgment and order affirmed.

We concur: Myrick, J.; Thornton, J.

MARTIN v. VANDERHOOF.

No. 9745; June 17, 1885.

7 Pac. 307.

New Trial.—A Statement on Motion for a New Trial, if neither signed nor certified by the judge of the court below, will, on appeal, be stricken out.

APPEAL from the Superior Court of Sonoma County.

Hearing on a motion to dismiss the appeal, and also to strike out the so-called statement, on motion for a new trial, on the ground that it was not certified by the judge of the court below, as required by statute: Code Civ. Proc., sec. 659.

D. C. Allen and W. W. Porter for appellant; A. B. Ware for respondent.

By the COURT.—The motion to strike out the so-called statement on motion for a new trial is granted. The motion to dismiss the appeal is denied.

ALLEN v. HOLT and Others.

No. 8997; June 23, 1885.

7 Pac. 421.

Ejectment—Allegations of Ownership.—In an action of ejectment, a complaint that alleges ownership in fee in plaintiff, and an ouster by defendant on a day named, before commencement of the action, is sufficient, without further alleging that plaintiff was the owner in fee at the commencement of the action.

APPEAL from Superior Court of the City and County of San Francisco.

Saffold & Menx for appellant; H. A. Powell and F. M. Husted for respondent.

THORNTON, J.—Appeal from an order granting a new trial. The complaint in this case states facts sufficient to constitute a cause of action. The point as to the averment of ownership is settled by the case of Salmon v. Symonds, 24 Cal. 264. See, also, Kidder v. Stevens, 60 Cal. 414; Van Rensselaer v. Bonesteel, 24 Barb. (N. Y.) 370; Teetshorn v. Hull, 30 Wis. 167. The court therefore erred in granting a new trial on the ground that the complaint was defective is not stating a cause of action. We see no ground on which the order can be sustained. The order is reversed, and cause remanded, with directions to the court below to deny the motion for a new trial.

So ordered.

We concur: Sharpstein, J.; Myrick, J.

GILSON v. ROBINSON.*

No. 8268; June 23, 1885.

7 Pac. 428.

State Lands.—A Certificate of Purchase Issued to One of Two Applicants for certain state lands is not conclusive (in a contest to determine the right of the applicants to acquire title from the state to such land) of the right of the holder of such certificate to purchase as against the other applicant, who is in adverse possession of the land; each party to such contest must prove the right which he asserts and claims, and he has no enforceable claim in absence of proof of the facts upon which such right depends.

State Lands.—A Certificate for the Purchase of State Lands is Void if issued before the plat of survey of the township has been approved by the government officer or filed in the proper office.

APPEAL from the Superior Court of the County of Monterey.

Wm. H. Webb for appellants; T. Beeman for respondent.

*For subsequent opinion in bank, see Gilson v. Robinson, 68 Cal. 539, 10 Pac. 193.

McKEE, J.—This is a contest involving the right to acquire title from the state to the southeast quarter of section 36, in township 15 south, range 2 east, Mount Diablo meridian. The right was awarded to the plaintiff, and from the judgment defendant appeals. The first application to purchase was made by the defendant. On the 21st of October, 1870, he filed his application in the office of the surveyor general of the state. On the 29th of December, 1873, the surveyor general approved it; the applicant made the first payment as required by the statute under which the application was made, and the register of the state land office issued to him a certificate of purchase.

The defendant was not in possession of the land when he applied to purchase it; and, in fact, it was in the actual adverse possession of another, who had settled upon it in the year 1869, inclosed part of it with a substantial inclosure, within which he made valuable improvements, and resided until the year 1871, when he sold and conveyed the entire tract to the mother of the plaintiff, who, having entered under her deed, occupied and used the land until 1873, when she died upon the land, leaving the plaintiff, as her only son and heir at law, in possession; and he has, since her death, had actual possession. The approved plat of the survey of the township in which the land is situated was not filed until the 27th of November, 1874; and after the same had been filed, the plaintiff, on the 13th of January, 1875, being in the actual possession of the land described on the plat as the southeast quarter of section 36, range 2 east, Mount Diablo meridian, made and filed an application to purchase the eighty acres of the said quarter section upon which his building and improvements were located; and afterward, on the 5th of April, 1876, before any action was taken upon his application, and before any intervening adverse rights in or to the quarter section had accrued or attached, he amended the applications asking to be allowed to purchase the entire quarter section, of which he was in the actual possession. Each applicant, at the time of his application, was qualified and competent to purchase.

In the trial of the contest the defendant gave no evidence tending to prove that in the application which he made he based his right to purchase upon occupancy in himself or

want of occupancy by anyone else. He rested his right solely upon the approval of his application by the surveyor general, and upon the certificate of purchase issued to him by the register of the state land office, and payment of the first installment of the purchase money. But the certificate of purchase did not vest him with the title to the land; the title remained in the state, and the payment gave him merely an equity as against all persons who had not a prior or paramount right to purchase from the state. The issuance of the certificate was therefore not conclusive of his right to purchase, as against the plaintiff, who was, in fact, in the adverse possession of the land. Section 1925, Code of Civil Procedure, declares that the apparent right of the holder of such a certificate "may be overcome by proof that, at the time of the location, ... the land was in the adverse possession of the adverse party as those under whom he claims." The plaintiff, being in the adverse possession, had, therefore, a paramount right to purchase: Conlan v. Quinby, 51 Cal. 413. Besides, as to him the certificate was void, because it was issued before the plat of survey of the township had been, by the government officer, approved or filed in the proper office: Medley v. Robertson, 55 Cal. 396.

Under these circumstances the defendant could not predicate a right to purchase merely upon the approval of his application by the proper officer of state. No presumption arises from that fact in his favor, that his application stated the requisite facts to entitle him to the right. In a contest as to such a right between himself and another, each party is an actor, and he is bound to prove the right which he asserts and claims. In the absence of proof of the facts upon which the right depends, he has no enforceable claim: Hildebrand v. Stewart, 41 Cal. 287; Woods v. Sawtelle, 46 Cal. 391.

Judgment affirmed.

I concur: McKinstry, J.

I concur in the judgment: Ross, J.

HOGAN v. TYLER.

No. 8744; June 24, 1885.

7 Pac. 454.

Appeal.—Where Evidence is Conflicting, the Court will not Interfere with the verdict, on appeal, on the ground of insufficiency of the evidence.

Appeal—Immaterial Evidence—Exclusion not Error.—A reversal is not warranted, on appeal, by the exclusion of evidence on the ground of immateriality, if the materiality of the evidence offered is not apparent.

APPEAL from Superior Court of the City and County of San Francisco.

George W. Tyler for appellant; Pillsbury & Titus for respondent.

THORNTON, J.—As to the insufficiency of the evidence to justify the verdict, it only needs to be said that the evidence is conflicting, and, under such circumstances, this court will not interfere with such verdict on appeal. The parol evidence of the plaintiff did not tend to contradict, add to, or vary the written contract entered into between the parties to this action. The oral evidence referred to a different agreement, which was never reduced to writing. Under such circumstances, the rule which excludes parol evidence on the ground that it will contradict, add to, or vary an agreement in writing does not apply: 1 Greenleaf on Evidence, secs. 284a, 303.

The defendant, on the cross-examination of plaintiff, put to him the following question: "Now, before you delivered these papers—this note and the policies of insurance—to Judge Tyler, did you have any conversation with Mrs. Hedge on the subject?" The question was objected to by the plaintiff as immaterial; that any conversation with Mrs. Hedge was immaterial, as she was not a party to the action. The objection was sustained and defendant excepted. Why this question was asked was not explained. No statement was made to show how the answer to it could be in any way ma-

terial to any issue involved in the cause. Under these circumstances we can see no error in the ruling of the court.

The plaintiff by his counsel asked defendant whether he was aware of certain evidence given by one Fred. Hedge at the time he (defendant) dismissed an action concerning which testimony had been offered in the case. Defendant objected to the question on the ground that it referred to a deposition which was given in another case, and which had not been offered in evidence herein. The objection was overruled and defendant excepted. The witness answered that he was aware that Hedge had made a deposition, which was in writing; that he had read it; but that he would not state the contents of it unless he was compelled to do so by the court. He at the same time stated that he did not think counsel correctly stated the contents of the deposition. This was substantially all that occurred in relation to the question and answer that is material. The witness was not asked to state the contents of the deposition. The inquiry extended only to his own knowledge of the evidence given by Hedge (which evidence was embodied in the question) at the time he dismissed the suit referred to. This he answered. We see no error in the ruling of the court. The contents of the deposition were not asked for, nor were they testified to. We cannot see in what manner defendant was prejudiced by a question whether at a time mentioned in it he was aware of the matters stated in the question. The above disposes of all the points made on behalf of appellant.

Judgment and order affirmed.

We concur: Sharpstein, J.; Myrick, J.

In re LING.

July 29, 1885.

7 Pac. 660.

Bill of Exceptions—Necessity for.—Where the Whole Case Appears on the Record, no bill of exceptions is requisite; the purpose of the bill of exceptions being to place on the record that which, without it, would not so appear.

Application to supreme court for settlement of bill of exceptions in a proceeding for removal of a civil officer.

W. Smith for petitioner.

By the COURT.—In this proceeding, as the whole case appears on the record, there is no bill of exceptions requisite. A bill of exceptions is only necessary to place that on the record which, without it, does not go on the record. In this case the action of the court can be reviewed on the transcript of the record of the case in the court below, on an appeal from the judgment of dismissal.

The application is denied.

FRINK v. ROE and Others.*

No. 8879; June 29, 1885.

7 Pac. 481.

Power of Attorney—Revocation by Death.—A power of attorney to convey becomes extinct by the death of the constituent, although the power be irrevocable, and no title passes by a deed subsequently made by the attorney.

Power of Attorney—Conveyance by Attorney in Payment of His Debts.—Where the intention in executing a power of attorney was to give the attorney control of the property for his own benefit, he may convey the same in payment of his own debts.

Evidence.—Declarations of an Owner of Land in Disparagement of his title are admissible in evidence against him, and all claiming under him, while the legal title remains in him; but such declarations are inadmissible where made by him after he has parted with his title.

APPEAL from Superior Court of the City and County of San Francisco.

E. A. & G. E. Lawrence for appellant; McAllister & Bergin and T. B. Bishop for respondent.

*For subsequent opinion in bank, see Frink v. Roe, 70 Cal. 296, 11 Pac. 820.

THORNTON, J.—The sale under the execution issued on the judgment in Smith v. City of San Francisco was regular, and passed all the title which the city had on the day of sale. The sheriff's deed passed such title to the purchaser, and such title came regularly by proper conveyances and vested in D. B. Rising, under whom both of the parties to this action claim. While Rising held the title, he executed to James H. Hodgdon a deed of release and quitclaim, bearing date the 30th of March, 1853, which was recorded on the same day, by which, for a consideration of seven thousand nine hundred dollars, he conveyed to Hodgdon the parcel of land in controversy, together with other parcels. On the same day Hodgdon executed to Rising, for and in consideration of five dollars, paid by the latter to him, a letter of attorney, by which he constituted Rising his attorney in fact, "without any revocation or power of revocation" on the part of the constituent, and authorized the attorney so constituted to grant, bargain, and sell the land conveyed by the deed to Hodgdon, just above mentioned, and other lands just before conveyed to him, some of them by Rising, and others by Rising and Raphael Schoyer. Rising was by the same letter authorized to convey said land, when sold, to the purchaser.

For what reason and with what intent were those papers executed? Why were these lands conveyed to Hodgdon, and at the same time a power by contract for a valuable consideration taken back by the grantor from his grantee? These documents on their face suggested inquiry. They may have been made to assume the form in which they are presented for various purposes. It would be idle to say that they were executed without a definite purpose and intent. It is unnecessary to speculate or hazard conjectures as to what the purpose and intent were, as we have as to that the testimony of a witness who testifies clearly and distinctly as to the purpose and intent with which they were executed; and it may be added here that the testimony of this witness is without contradiction, and is the only evidence on the point. The witness referred to, Hiram C. Clark, states in his testimony that he was, prior to and during March, 1853, an attorney and counselor at law, practicing his profession in the city of San Francisco; that he drew the deed and the letter of attorney above mentioned, bearing date the 30th of March,

1853, at the request of Rising; that he never saw Hodgdon until he came to execute the deed, which was done in his presence; that he was, during the period of time above mentioned, a notary public in the city aforesaid, and took the acknowledgment of Hodgdon to the letter of attorney, and of Rising to the deed referred to. It may be stated here that these documents show that the acknowledgments of their execution appended to them were taken by Clark as notary. The witness further stated that he, at the time referred to above, was the attorney of Rising and Schoyer; that Rising alone consulted with him as to the transaction; that when Hodgdon called to execute and acknowledge the instruments he stated to him their contents; that Hodgdon sat down and made his signature, and he took his acknowledgment; that he was paid for his services in the business by Rising, Casselli & Co.; that Hodgdon paid Rising nothing in his presence; and that Rising told him at the time that Hodgdon was then a clerk for Rising, Casselli & Co. The further testimony of this witness we extract from the record. In making this extract we omit certain objections made by counsel for defendants, which are not in any sense important or material. The following is the testimony referred to:

"Question. In regard to the power of attorney, that was from Hodgdon to Rising, dated on the 30th of March; it is irrevocable in its character. I will ask you if you ever had any conversation with Mr. Rising or with Mr. Hodgdon, with reference to the preparation of that power of attorney? Answer. I had a conversation, and I think Mr. Rising asked my advice as to giving this power of attorney. Mr. Rising didn't profess to be a lawyer; he would ask me these questions and I would answer them. I gave him advice as to power of attorney. Q. Now, what transpired at that time? I want to get out all that transpired between you and him with reference to that, as near as you can. A. I looked upon it as a pretty important matter—conveying so much real estate to Mr. Hodgdon. It was an important transaction, and I remember of advising Mr. Rising to keep the power in his own hands, and he wanted to know what instrument to take back—he was going to make the conveyance. Q. Take back from Mr. Hodgdon? A. From Mr. Hodgdon, for he was to manage the affair. Q. Mr. Rising was to man-

age the affair? A. Yes, that is what he told me—to manage the matter; and then I told him that I could prepare, I thought, a power of attorney that would make his safe. Q. Safe in regard to what matter? A. Well, putting this title into Mr. Hodgdon's hands; he was conveying a good deal of this property, if I remember right, in that deed; and then he would like me to still draw some instrument by which he would be secured and still manage the property. Q. Be secure in the title? A. Yes, sir. Q. Or secure in the ownership? A. Well, in his rights; he claimed he had a right. Q. Well, now, can you tell us what he represented to you as being his rights in the property after the conveyance was made to Mr. Hodgdon? I want to get at the bedrock, if you can. A. It was a wish to manage the property—to make sales; they were to convey and reconvey. I don't know; these conveyances were jumping around, and he wished still to retain control of the property; that is what he told me—his precise language I don't remember. Q. Did he still retain control of the property after the conveyance? A. I could not answer that. Q. Will you state again with regard to what he wanted? A. Before you take that down—I don't know that this will be responsive. He claimed the management of the property. That would be the word I would use there. Q. At whose instance was this irrevocable power of attorney prepared—at your own, or that of Mr. Rising? A. It was at Mr. Rising's, as I stated; Mr. Rising ordered it to be done. Q. Did Mr. Rising consult you with reference to taking a reconveyance from Mr. Hodgdon of the property? A. He wanted some—he wanted the property in his hands; that is what he said substantially. I don't give his exact language; that was precisely the idea he conveyed; then he left to me to retain that power. The power of attorney was drawn at my suggestion. Q. Did the question come up which would secure him the best,—a power of attorney, or deed of conveyance from Mr. Hodgdon back to him; not to be recorded? A. Yes; that was talked of. It was talked over, but it was left to me the kind of instrument which would protect his rights. Q. Left to you to draw an instrument which would protect his rights in the property? A. Yes, sir. Q. And those rights were the management and control of the property, was it? A. Yes, sir; he can

make sales, and Schoyer makes sales. Q. Was it not at that time talked of by him that Mr. Hodgdon was about to leave the state? A. I have no recollection—he spoke of Mr. Hodgdon going away—no present recollection. Q. Do you know why a five dollar consideration was put into the power of attorney? A. To make it a power of attorney coupled with an instrument. Q. That was the object? A. That was the object; yes."

It is clear from this testimony that the documents were drawn and executed in the form in which they are presented to us in the record, with a view to give Rising the control of the property, so that he might dispose of it in any mode he might desire. No doubt it was the intention to vest in Rising an interest which would fasten the power granted to him by the letter of attorney with such interest. This, the attorney stated, was his object in inserting the consideration of five dollars in the letter of attorney, and he so advised Rising. The means taken did not in law create such an interest, within the rule laid down in Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589, and Barr v. Schroeder, 32 Cal. 618, for the letter of attorney transferred no interest in the land mentioned in it to Rising. But the documents and the testimony show what was the intention of the parties—that Rising was to have the exclusive power to dispose of and convey the land. This was what the parties, Hodgdon and Rising, wished to accomplish. The power to sell was purchased by Rising of Hodgdon for a valuable consideration. Under the circumstances it was a contract between Rising and Hodgdon that the former should have the exclusive and irrevocable right to sell the property described in the letter; and as it was intended to give Rising the sole control of the property, it invested him with a right to the proceeds of the sale. If the arrangement did not effect this, it was a mere idle formality. It appears that under this letter of attorney Rising, as the attorney of Hodgdon, and in his name, executed two deeds conveying the land in controversy. The first in point of time was executed to David S. Turner and Samuel Hort, on the tenth day of October, 1853, on which day the letter of attorney was duly recorded. The deed to Turner and Hort was recorded on the 13th of October, 1853. The second deed was executed to Rufus Wade, bore

date the 28th of May, 1866, and was recorded on the 31st of same month.

The last-mentioned deed will be considered first. Hodgdon had departed this life in 1862. So far as regards the power to convey, this deed passed no title. The power granted by the letter of attorney, though irrevocable, became extinct by the death of the constituent. The law is so ruled in the case of Hunt v. Rousmanier, supra, where the rule and the reasons of its adoption are fully stated. The power under consideration here, though irrevocable by the constituent during his lifetime, is not one coupled with an interest, and therefore does not survive the author of it. It ceased upon his death. The claim of plaintiff to recover on the deed to Wade cannot be sustained. It appears that the deed to Turner and Hort was an assignment to them in trust for the benefit of the creditors of Rising, Casselli & Co., of which firm D. B. Rising was a member. It is argued that this deed is a nullity, because it was not made in accordance with the power, as the power did not authorize the attorney in fact, Rising, to sell and convey his property to pay his debts. Conceding this to be ordinarily correct, still as we have determined that the arrangement under which the letter of attorney was executed by Hodgdon to Rising was intended to give the latter the control of the property for his own benefit, we are of opinion that this rule has no application here; that Rising had the full power to sell to the trustees; and that his conveyance to them was valid to transfer the title to them. The plaintiff connected himself with Hort and Turner by proper mesne conveyances, and, in our judgment, through it was invested with title to the property in suit, if the defendants had notice of the agreement made between Hodgdon and Rising at the time of the execution of the deed of the 30th of March, 1853, by the latter to the former, and of the letter of attorney above spoken of, bearing date on same day. On this point we are of opinion that the deed and letter of attorney just above referred to, which were on record long before [Howard] in 1870, the grantor of defendants, purchased, together with the deed to Turner and Hort by Rising under the power, which was also on record, were sufficient to put a purchaser from Hodgdon, or anyone claiming under such

purchaser, on inquiry as to the facts and circumstances under which such documents were executed.

The peculiarity of these papers would at once suggest an inquiry, to a person of ordinary prudence, why and for what purpose were they executed? It does not appear that any inquiry was made at all. It was assumed that the title was in the devisee of Hodgdon, and a deed was procured from such devisee, under which defendants endeavor to protect themselves. There are other circumstances which might have been discovered on inquiry, if it had been made. It would have been ascertained that Hodgdon left this state in 1853, went to the east, from which he never returned, and died in Philadelphia in 1862. During this period he paid no attention to the property, and acted as if he had no interest in it. After his death nothing was done in relation to the land in suit until 1870, when Howard, under whom defendants claim, bought it, among other parcels of land situate in the city of San Francisco, from the devisee of Hodgdon, and procured from her a conveyance of it. It does not appear that either Howard, or anyone claiming from him, ever made any inquiry as to the circumstances under which the deed to Hodgdon was executed by Rising, or the letter of attorney executed by Hodgdon to Rising. Under these circumstances the court is of opinion that Howard, and all those claiming under him, must be held to have had notice, when they took the deeds executed to them, of all the facts and circumstances, and the agreement under which the deed was executed under the letter of attorney by Rising to Turner and Hort, which deed was, in our opinion, valid, and transferred the title to them. The statute of frauds offers no difficulty in the case. The contract between Hodgdon and Rising became executed by the conveyance made to Turner and Hort in October, 1853, by Rising, under power from Hodgdon. After that time the statute of frauds could not be invoked by Hodgdon, or anyone claiming it, even conceding, but not intending to hold, that the statute before that date would have been a bar to the specific execution of the contract referred to.

As the case goes back for a new trial, it is proper to pass on some other questions raised on the record. The plaintiff offered to prove by a witness certain oral declarations

of Hodgdon, made in the month of April, 1853, in disparagement of his (Hodgdon's) title to the property involved herein. This offer was made by plaintiff when making out his case, and was renewed in rebuttal. They were ruled out on both occasions, and plaintiff excepted. The court committed no error in rejecting the offer when first made, for it did not then appear that the title had ever been in Hodgdon. But the defendants in putting in their testimony, offered the deed of the 30th of March, 1853, executed by Rising to Hodgdon, by which the title was transferred to the latter. His declarations made after that time, while the legal title remained in him, in disparagement of his title, were admissible against him and all claiming under him: 1 Greenleaf on Evidence, sec. 109; Code Civ. Proc., sec. 1849. The legal title vested in him on March 30, 1853, and passed out of him by the deed executed by him through Rising under the letter of attorney to Turner and Hort, on the tenth day of October, 1853. The declarations made in 1859, after the last-mentioned date, were not admissible. Those made in April, 1853, were admissible, and the court erred in excluding them: McFadden v. Wallace, 38 Cal. 51; McFadden v. Ellmaker, 62 Cal. 348.

For the foregoing reasons the judgment is reversed and the cause remanded for a new trial. Ordered accordingly.

We concur: Sharpstein, J.; Myrick, J.

BATH v. VALDEZ and Others.

No. 9938; June 29, 1885.

7 Pac. 487.

Adverse Possession—Evidence.—On a Review of the Evidence, Held, that the plaintiff had not acquired title by adverse possession to the whole of the premises in dispute, and judgment affirmed.

APPEAL from Superior Court of the County of Los Angeles.

Brunson, Graves & Chapman for appellant; Bicknell & White, G. M. Holton, Howard & Roberts and H. A. Barclay for respondents.

MYRICK, J.—Action to quiet title. The court below decreed that plaintiff was the owner of an undivided one-half of the premises, and that certain of the defendants were the owners of the other undivided one-half—one-twelfth each; and that plaintiff had not acquired the interest of the defendants by adverse possession. We are of opinion that the findings are supported by evidence; therefore, we look to the findings and the conclusions of law and decree to determine if any error was committed by the court in making the decree.

In 1862 Julian Valdez had title to the premises as the common property of himself and his wife, Manuela. In 1863 Julian Valdez died intestate, leaving him surviving Manuela, his widow, and his mother, and several brothers and sisters, as his heirs. In April of that year the widow obtained letters of administration. In 1865 Manuela intermarried with one Chavez, and thereafter, in the same year, she and her then husband executed a deed of the premises to one Peppers, by which they remised, released and quitclaimed "all that lot," describing a tract including the premises in controversy. Under this deed Peppers took and retained possession until, in July, 1872, she executed a grant, bargain and sale deed to Burrows, and from Burrows the title comes, by mesne conveyance of grant, bargain and sale, to plaintiff. Plaintiff's grantors were respectively in the undisturbed possession of the premises during the periods while they had title; they placed improvements on the property, received the rents, and had the entire enjoyment thereof. Plaintiff purchased in January, 1882, and this suit was commenced in October, 1882. The court also found:

"That the said plaintiff, his grantors, ancestors and predecessors, from the 4th of October, 1865, have received all the rents, issues and profits of the premises, paid all taxes that have been imposed thereon, and occupied the same, and that neither the said plaintiff nor his grantors or ancestors or predecessors, or any of them, ever gave any notice, actual or other-

wise, to the defendants, or any of them, that he or they or any of them intended to or did or were claiming and holding the said premises or any part thereof, adverse to the said Jose E., Brigido, Vincente, Juan, Felipe, and Maria de Los Angeles Valdez and Guadalupe V. de Rocha or either or any of them; nor was the said plaintiff, or the said Burrows or Roques or the said Dassaud, or the said Goodwin, or any or either of them, ever heard to make or assert any claim to the land in controversy adverse to the said defendants Valdez or Rocha, or any of them, or under whom they claim, prior to the commencement of this action."

From the marriage of the widow of Julian Valdez, in 1865, until 1882, nothing was done in the administration of the Valdez estate; but in 1882 Brigido Valdez, one of the brothers of the deceased, obtained letters, and such proceedings were had that in 1883, after the commencement of this action, distribution of the property was made by the superior court, sitting in probate—one-half to Burrows, grantee of Manuela, and the other half to brothers and sisters of the deceased, one-twelfth each; the mother and one brother having died in the meantime.

The court below based its decree on two propositions, viz.: First, the plaintiff had not acquired the property, as against the heirs of Julian Valdez, by virtue of the statute of limitations, and, second, he was estopped by the decree of distribution in probate from asserting that the Valdez heirs had no title.

The first proposition alone is sufficient for the decision of this case. The widow of Julian Valdez, owning the undivided one-half of the property as survivor of the community, executed a quitclaim deed. Her grantee entered under that deed, and although that grantee and her successors in interest down to plaintiff have been in possession enjoying the property (the later holders believing that they owned it entire), yet they never "gave any notice, actual or otherwise, to the defendants, or any of them, that he or they, or any of them [plaintiff and his predecessors], intended to or did, or were claiming and holding the said premises, or any part thereof, adverse to the said Valdez heirs." With such facts it cannot be successfully asserted that the possession of plaintiff and his

grantors was adverse to such heirs. This case is quite different from Unger v. Mooney, 63 Cal. 586.

We have examined the various points presented by appellant, and find no material error in any matter affecting the judgment.

Judgment and order affirmed.

We concur: Sharpstein, J.; Thornton, J.

REAY v. BUTLER and Others, and TREADWELL, Intervener.*

No. 8937; July 30, 1885.

7 Pac. 669.

Ejectment—Effect of Intervention.—The effect of an intervention is to add new parties for the purpose of determining all conflicting claims to the matter in controversy, and does not affect the nature of the action at all, or interfere with the trial thereof; and therefore, where the plaintiff, in an action of ejectment, desires a jury trial, the filing of an intervention praying equitable relief will not affect such right, and a denial of a jury is error.[1]

Ejectment—Intervention, When Allowed.—A person who does not claim to have derived title from both plaintiff and defendant in ejectment, and does assert title in himself paramount to both, cannot intervene in such action. Whether intervention applicable to ejectment at all, quære.

Ejectment—Intervention—Amount of Judgment.—Where an intervener in an action prays for only part of the demanded premises,

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*For subsequent opinion in bank, see Reay v. Butler, 69 Cal. 572, 11 Pac. 463.

[1] **Cited,** with other cases, in Rocca v. Thompson, 223 U. S. 331, 56 L. Ed. 458, 32 Sup. Ct. Rep. 210, as authority for the definition, contained in Black's Law Dictionary, for "Intervention," thus: "In practice; a proceeding in a suit or action by which a third person is permitted by the court to make himself a party, either joining the plaintiff in claiming what is sought by the complaint, or uniting with the defendant in resisting the claims of the plaintiff, or demanding something adversely to both of them."

Cited in McNeil v. Morgan, 157 Cal. 377, 108 Pac. 70, on the right of an intervener to a jury trial.

it is error for the court to render judgment in his favor for the whole of the same, and to enjoin the plaintiff from prosecuting or maintaining an action therefor.[1]

APPEAL from Superior Court, City and County of San Francisco.

A. E. Lawrence and Flournoy & Mhoon for appellant; Fisher Ames and Wash. C. Burnett for respondent.

McKEE, J.—From a final judgment entered on the 31st of December, 1879, and from an order made and entered on the 28th of December, 1880, denying a motion to vacate and set aside said judgment, the appeal in this case has been taken. The judgment was rendered in a proceeding of intervention filed in an action of ejectment, brought by J. W. Reay against John Butler and P. H. Owens, defendants, to recover possession of a tract of land "situate in the city and county of San Francisco, described as follows, viz.: Commencing at a point 8.04 chains south of the quarter section post in the center of section 7, township 2 S., range 5 W.; thence north 22.54 chains; thence east 26.80 chains; thence running north 80¼ degs., east 3.08 chains; thence south 24.85 chains; thence west 29.44 chains, to the place of beginning containing 54.30 acres, more or less, being the land immediately west of what is known as the 'Dana Tract,' and what was formerly the Sans Souci rancho, and located near the Lone Mountain cemetery, and adjoining Kilian's and Culver's land."

The complaint was filed on the 20th of February, 1866. On the 2d of March, 1866, the defendants appeared, by J. P. Treadwell, their attorney, and filed an answer in which they "deny each and every the allegation in the said complaint contained," and aver that J. P. Treadwell was, "at and before the filing of the complaint, and still is, the owner of, and in the possession and occupation and entitled to the possession, of the land; and that they are in possession under and by license from him and in subordination to his right and title, and not otherwise"; and that "said Treadwell is

[1] Cited and approved in Tuckfield v. Crager, 29 Utah, 483, 82 Pac. 862, in an action for an injunction, and for damages in trespass for entering plaintiff's premises and tearing down a fence.

ready and willing to and does defend this action as landlord and owner of the demanded premises."

Pending the action upon the issues raised by that answer, Treadwell, the attorney of record for the defendants, upon the 25th of June, 1867, applied in proper person for and obtained an order permitting him, in his own behalf, to intervene in the action and on the same day he filed his complaint in intervention, in which he alleged that he was the owner and in possession of a tract of land described as "all that part of the demanded premises known as and called 'Speck Ranch' (and otherwise as 'Treadwell's Ranch'). Said ranch is situated in the city and county of San Francisco, is within the demanded premises, and is bounded and described as follows: "Commencing at the northwest corner of the Sans Souci property, as called for, near a shed there; thence west 7.29 chains; thence south 88 degs. 10 min., west 11.38 chains; then south 86 degs. 30 min., west 10.87 chains, on the east, south, and west by a line running south from said northwest corner 17.38 chains; thence north 15 degs., west 1.65 chains; thence to west end of the line above described as the northerly boundary line of said ranch"; that plaintiff and defendants have confederated "to trick him out of possession of said ranch, by means of a clandestine suit of ejectment," founded on a pretended deed or conveyance of said ranch, made by the defendant Owens to the plaintiff, upon which the plaintiff intends to rely in the trial of the action; that said deed is a cloud upon his title; and that the claim based upon it "is without right, invalid, and unfounded"; therefore he asked that he be quieted in his title and possession against said claim, and that Reay, the plaintiff in the ejectment, be forever enjoined from prosecuting the action, and from commencing and prosecuting any other action against him for the recovery of said ranch.

No answer was filed to the intervention by Butler and Owens. Each made default, and judgment by default was entered against them. Reay filed an answer containing specific denials of all the allegations contained in the complaint, and on the 8th of February, 1868, moved to strike out the intervention, on the ground that the proceeding was

not applicable in an action of ejectment. The motion was denied and he excepted.

The record shows that the case came on for trial on the 25th of February, 1868, before a jury impaneled and sworn to try the cause; that in the course of the trial, upon motion of the intervener, the court over the exception of the plaintiff, discharged the jury, and ordered that the case be put upon the equity calendar for trial by the court sitting without a jury; that afterward, in November, 1869, the intervention was tried and submitted; that no decision was rendered until the 14th of April, 1873, when findings for the intervener were ordered to be "drawn and submitted for settlement"; that the findings were not settled until the 31st of December, 1879, when they were filed, and upon them a decree was entered on the same day, adjudging that "at the time the action of ejectment was commenced the intervener was and still is the owner of the land described in the complaint, and complaint in intervention, and neither the plaintiff nor either of the defendants, Butler or Owens, had or have any right or title thereto and the facts as to the possession and title entitles the intervener to a decree quieting him in his title and possession to the said land in question against the plaintiff"; and "that the plaintiff, J. W. Reay, be, and is hereby, perpetually enjoined from further prosecuting his complaint in ejectment in this case, and from all further proceedings therein in this cause, and from bringing and prosecuting any other action of ejectment for the Speck ranch, the land in the complaint, and the complaint of intervention described against the intervener's servants or tenants by collusion with them not to inform the intervener thereof."

The contention which is made on the appeal is that the court below erred in (1) denying the motion to strike out the intervention; (2) discharging the jury impaneled and sworn to try the case, and refusing to try the original action; (3) ordering the case to be submitted upon the issues joined in the intervention only; and (4) denying the motion to set aside the decision and judgment announced therein. This contention involves the regularity of the proceedings in intervention, and the right of intervention in an action of ejectment.

Assuming that the right existed, we think that the plaintiff in ejectment was entitled to a trial of the issues joined between himself and the defendants, and that he had a right to a trial by jury: Practice Act, sec. 153; Weber v. Marshall, 19 Cal. 447.

The statute under which the intervention was inaugurated required that the complaint be filed before or after the joinder of issue in the original action, and at such a time as would not interfere with or delay the trial thereof: Practice Act, sec. 660; Hocker v. Kelley, 14 Cal. 164. And after joinder of issue in the intervention in the action, it was made the duty of the court to try and decide both issues at the same time. Section 662 of the Practice Act (Stats. 1874, p. 73) declared that "the court shall determine upon the intervention at the same time that the action is decided." Intervention under the statute, therefore, merely results in the addition of a new party or new parties to an original action for the purpose of hearing and determining, at the same time, all conflicting claims which may be made to the subject matter in litigation. It was not intended to change the nature and character of the action itself, or to stop the machinery of a trial thereof. The denial of the right of the plaintiff to a jury trial was therefore erroneous, and the discharge of the jury which had been impaneled and sworn to try the action was irregular. Besides, the intervener did not claim a right to the demanded premises in conflict with the right of entry asserted by the plaintiff in the action of ejectment against the defendants. In his complaint he alleges that he is "owner and in possession of all that part of the demanded premises known as and called 'Speck Ranch' (and otherwise as 'Treadwell's Ranch')," which "is within the demanded premises." He thus asserted a right to only part of the demanded premises, but the court adjudged him to be the absolute owner of all the demanded premises, and perpetually enjoined the plaintiff from prosecuting his action, and from ever thereafter maintaining any other action for the same land. This was error: Hayes v. Martin, 45 Cal. 559. Moreover, the intervener admitted, because he alleged, that he was in the actual possession of all the land which he claimed, under paramount title to it. He was therefore vested with complete pro-

prietorship; and neither between him and the plaintiff in the action, nor between him and the defendants, was there any conflicting claim as to the possession. The plaintiff claimed no right of entry against him, and he claimed no right of entry against the plaintiff nor against the defendants. Ejectment was brought against the defendants only; and they, having appeared by an attorney, with whom there could have been no collusion, because he was the intervener himself, denied the right of the plaintiff to possession, and admitted possession in themselves as licensees of their landlord, the intervener. The right of possession was, therefore, the only matter at issue between them and the plaintiff. No ejectment is maintainable where a plaintiff has not a legal right of entry against defendants named in the action. The intervener was not named as a party. He was not, therefore, connected in any way with the matter at issue between the parties. He did not claim to have derived title to the demanded premises from either the plaintiff or defendants, or either of them; and he did claim to be in actual possession and vested with title paramount to both. In ejectment, a person who is no way connected with the right of possession asserted by the plaintiff or the defendant, but, on the contrary, alleges title in himself paramount to both, has no right of intervention: Porter v. Garrissino, 51 Cal. 559.

Upon the allegations of his complaint the intervener had no cause of intervention. The alleged facts may have constituted a direct cause of action in equity under section 254, Practice Act, independent of the ejectment suit. Intervention was therefore unnecessary, because, as the intervener had appeared as attorney for the defendants, he could have defended the action for them; or, if it were possible, under the circumstances of his appearance as their attorney, to have presumed collusion between the plaintiff and his clients as his tenants, he, as landlord, could have had himself substituted as a codefendant with them, or as a defendant in their stead: Dutton v. Warschauer, 21 Cal. 619, 82 Am. Dec. 765; Valentine v. Mahoney, 37 Cal. 389. Otherwise, having no personal connection with the question at issue in the case, there was no way in which he could be prejudiced or his rights affected by any judgment therein, unless in assuming the defense he himself put the title in issue: Russell v. Mallon, 38 Cal. 259;

Valentine v. Mahoney, 37 Cal. 389. And that being the case, the right of intervention was inapplicable: Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569.

Whether intervention is applicable at all to an action of ejectment it is not necessary in this case to determine. As we have already announced, where a person does not claim to have derived title from the plaintiff or defendant in the action, and does assert title in himself paramount to both plaintiff and defendant, there can be no intervention: Porter v. Garrissino, supra.

Judgment and order reversed and cause remanded for further proceedings.

ROSS and McKINSTRY, JJ., Concurring.—We concur in the judgment, and in what is said by Mr. Justice McKee down to the words "moreover, the intervener admitted," etc. We also agree that the facts stated in the complaint of Treadwell are insufficient to show a cause of intervention on his part in the action of ejectment.

PARKER v. BERNAL.*

No. 11,018; July 31, 1885.

7 Pac. 634.

Appeal—Dismissal.—Though an Appeal Appear Totally Destitute of Merit, yet, if regularly taken, the court will be reluctant to dismiss it summarily.

APPEAL from Superior Court, City and County of San Francisco.

Motion to dismiss appeal.

Moses G. Cobb for appellants; Chas. H. Parker for respondents.

*For subsequent opinion, see 68 Cal. 122, 8 Pac. 696.

By the COURT.—The appeal in this case is totally destitute of merit. But, as the appeal seems to be regularly taken, we are reluctant to dismiss it directly. The motion to dismiss is therefore denied, which is ordered, with leave to either party to submit the case for decision after the lapse of ten days from the filing of this opinion.

MEYSAN v. CHABRIE.

No. 9354; July 31, 1885.

7 Pac. 634.

Appeal—Record must Show Entry of Judgment.—An appeal from a judgment cannot be considered if the record shows no entry of it.

APPEAL from Superior Court, County of Inyo.

Reddy & Conklin for appellant; J. W. P. Laird for respondent.

By the COURT.—The appeal from the judgment cannot be considered, as the record shows no entry of it: McLaughlin v. Doherty, 54 Cal. 519; Preston v. Hearst, 54 Cal. 596.

It does not appear on what the order on the motion to vacate the judgment by default was made. The record shows no authentication in any mode of any papers or documents used on the hearing of such motion. The only document before us on such appeal is the order of the court made on the motion, and in this order we see nothing erroneous.

Appeal from the judgment dismissed and order affirmed.

HALEY v. SHEPHERD.

No. 9901; July 31, 1885.

7 Pac. 635.

Appeal—Conflicting Testimony.—Where, on Appeal, the Case presented is one of conflict of testimony, the judgment of the lower court will not be disturbed.

APPEAL from Superior Court, County of Los Angeles.

H. Allen and S. Haley for appellant; Bicknell & White for respondent.

By the COURT.—On an examination of the testimony in this case, we cannot say that the conclusion reached by the court below is not correct. It seems to us to be in accord with the deed from the mayor and common council of the city of Los Angeles to Basilio Jurado, under which plaintiff claims. The case presented is one of a conflict of testimony, and in such state of the testimony we never disturb the judgment or order of the court below.

Judgment and order affirmed.

LEVY v. BALDWIN.

No. 8980; July 31, 1885.

7 Pac. 683.

Pleading—Amendment to Answer—Postponement for.—Court may, in the exercise of its discretion, refuse a second postponement of a trial, or may refuse an amendment to the answer asked for at the trial.

APPEAL from Superior Court, City and County of San Francisco.

Lloyd & Wood for appellant; William H. Sharp for respondent.

By the COURT.—The court properly exercised its discretion in refusing a second postponement of the trial, and refusing the amendment to the answer asked for at the trial. The charge of the court was correct, and the request to charge was properly refused. We find no error in admitting the evidence of plaintiff that the stock mentioned in the complaint was purchased for defendant through E. H. Hall & Co.

There is no error in the record and the judgment is affirmed.

MOORE v. MOORE.

No. 9677; August 1, 1885.

7 Pac. 688.

Appeal.—Where the Evidence is Conflicting the Findings will not be disturbed, but the judgment affirmed.

Immaterial Evidence, Effect of Rejection of.—The rejection of immaterial evidence does not constitute error.

APPEAL from Superior Court, County of Butte.

J. W. Turner, and Gray & Sexton for appellant; Riordan & Freer for respondent.

FOOTE, C.—This cause comes up on appeal from the superior court of the county of Butte. One brother sued another for money alleged to be due on an account. The specifications of error set out that the court below found against the evidence in findings 1, 2, 3, 4, 6, 7, 12, and 13, and that it improperly sustained the plaintiff's objection by his counsel to a question put by defendant's attorney to the plaintiff when on cross-examination as a witness. The evidence in this case on the trial—a jury being waived—was conflicting throughout; but it was sufficient to sustain the findings of the judge below, who saw the parties, and had a better opportunity than this court can have to judge of their relative merits as truthful and fair witnesses, or the contrary. The question put the plaintiff on the stand, when on cross-

examination, "as to why he did not include something in Exhibit B," was certainly immaterial to any issue in the case, and the objection to it was properly sustained.

There were other errors complained of, but, as they were not included in the specifications of error below, they cannot be noticed here.

There being nothing in the record to warrant a reversal of the judgment in this case, it ought to be affirmed.

We concur: Belcher, C. C.; Searls, C.

By the COURT.—For the reasons given in the foregoing opinion, the judgment is affirmed.

HAMILL v. LITTNER.

No. 9800; August 12, 1885.

7 Pac. 707.

Findings—Submission on Agreed State of Facts.—Findings are not necessary in a case submitted on an agreed statement of facts.

APPEAL from Superior Court, Sacramento County.

Freeman & Bates for appellant; A. P. Catlin for respondent.

BELCHER, C. C.—This case was submitted to the court below upon an agreed statement of the facts, and findings were, therefore, not necessary. Besides, the court, in its decision of the case, recited the facts substantially as they were agreed to, and these facts, and the conclusions of law thereon, were separately stated. The exact point involved in this case was decided in Hay v. Hill, 65 Cal. 383, 4 Pac. 378. We are satisfied that that decision was right. Upon the authority of that case, the judgment here should be affirmed.

We concur: Searls, C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment is affirmed.

DAMSGUARD, Assignee, etc., v. GUNNOLDSON.

No. 9718; August 22, 1885.

7 Pac. 772.

Demurrer—Error in Overruling—Specification.—Where No Demurrer Appears in the transcript, the overruling of the demurrer to the complaint, specified as error, will not be considered on appeal.

Evidence—Wrongful Admission.—A Reversal is not Warranted by the Admission without prejudice to the appellant of immaterial or incompetent evidence.

APPEAL from Superior Court, Placer County.

Jo. Hamilton and J. E. Prewett for appellant; J. M. Fulweiler and Hale & Craig for respondent.

FOOTE, C.—This is an appeal from a judgment and from an order denying a motion for new trial. The plaintiff is the assignee of one Phillip Lang, who had been adjudged an insolvent, under the act of April 16, 1880, of the legislature of California. The assignee claimed in the action brought by him against Gunnoldson, that the insolvent, Lang, in contemplation of insolvency, and with a view to defraud his creditors, had conveyed certain pieces of real property to Gunnoldson, and that Gunnoldson, upon application duly made for the restitution and possession of the property, had refused to either make a conveyance of it to the assignee or to give him possession of the same, and that Gunnoldson had kept possession thus wrongfully of a certain sawmill and tract of land on which it stood, and had prevented, by his acts of pretended ownership, the assignee from getting possession of a large number of saw-logs lying and being on the mill tract of land, and sawing them up into lumber or otherwise utilizing them for the benefit of the insolvent's estate. He further charged in his complaint that by the wrongful and deceitful acts of Gunnoldson the estate of the insolvent in his hands for distribution had been damaged to the amount of several thousands of dollars. The defendant answered the complaint and denied specifically its allegations, and set up by way of defense the fact that he had a lien upon the mill tract of land

for about nine hundred dollars, with interest, and that although he had a deed to the land in the form of bargain and sale, he only claimed it to be a mortgage to secure his debt, and upon the issue thus made up the case went to trial, a jury being waived. A judgment was rendered in the court below for the plaintiff against the defendant for the sum of nine hundred and twenty-five dollars, damages and costs; the defendant's mortgage was recognized as a lien upon the property to secure his debt and interest; and the plaintiff, subject to this lien, was declared to be the owner of the property set out in the deed to Gunnoldson from Lang. A motion for a new trial was made and denied, and this appeal was taken.

The specifications of the insufficiency of the evidence state, among other things, that the court found contrary to the evidence in its sixth, seventh, eighth, ninth and tenth findings of fact. The main questions under those findings were: Had the defendant wrongfully and fraudulently withheld possession of the mill tract of land from the plaintiff, after due notice to yield its possession, and that of the sawmill and logs and appurtenances? And, if so, whether, by these wrongful and fraudulent acts, the plaintiff had been kept out of possession of the mill, land, saw-logs, etc. And whether the defendant had thus caused damage to the estate of the insolvent in the hands of the assignee; and, if so, how much. It is plain that upon all these questions the evidence was conflicting, as a reference to the statement on motion for new trial—which is exceedingly full—shows. The letter of the defendant of itself makes it evident that he refused to deliver possession of the premises demanded of him. The testimony of John Meyer, P. Lang, Mrs. Annie Lang and J. Howser certainly went to prove the effort made by the defendant to induce the plaintiff to believe that he (the defendant) was the absolute owner of the land and sawmill standing on it, and would not yield the possession of them to him, perhaps with a view to a forced sale and the sacrifice of the saw-logs at such sale, which might in that event be bought by the defendant at a nominal price, perhaps with the view and hope that he might be permitted to hold on to the land and sawmill as an owner in fee simple.

The evidence tended to show that Gunnoldson wished to conceal from the plaintiff the exact nature of the deed from

Lang of the property in question; for we have seen that he never explained in the first instance to Meyer, the plaintiff's agent, to what extent his title, and the conveyance he held, really went. Had Gunnoldson intended to deal fairly with the assignee, he would, at the first interview with the agent, not only have offered in plain terms to give up the property, cancel the deed he held, if paid the debt he held against it, but he would have explained without hesitation the whole connection he had with it. Instead of pursuing this course, he chose rather to act differently. He went to a lawyer and caused the letter which is in evidence to be written, in which he not only declares that he will not give up the land on which stood the sawmill and lay the logs, but he even ridicules the pretensions of the assignee to demand it. The evidence makes manifest the fact that the saw-logs depreciated in value by reason of the plaintiff being unable to saw them up into lumber or otherwise utilize them, and that his efforts to do this in good faith were frustrated by those of the defendant, trying to induce the belief in the plaintiff that his title as assignee to the property was worthless and his own good. The plaintiff appears from the evidence to have done all that a prudent and honest man could, to recover possession of the land, sawmill and logs of timber and to utilize them for the benefit of the insolvent's estate; and that he did not do so is entirely due to the conduct of the defendant, who sought to deceive him and embarrass his action, and succeeded in his efforts. And this deceitful conduct on the part of the defendant continued until the time had come when the saw-logs were practically worthless.

The evidence as to the quantity of the logs and their value was somewhat conflicting, but both quantity and value, as fixed by the court, were, we think, fair, taking all the testimony into consideration. The court allowed the plaintiff the value of the logs at the time when they could have been utilized for lumber or sold at seventeen hundred dollars; that is, four hundred and twenty-five thousand feet of saw-logs, at four dollars per thousand. This was fair. It then reduced this amount by the sum of three hundred and fifty dollars, which the evidence showed it would have cost the plaintiff to put the sawmill in repair in order to saw up the logs, and by the sum of four hundred and twenty-five dollars, which was

the value of the logs at the time when the defendant eschewed all claim to the land and mill, and first set up his mortgage claim only. That left the sum of nine hundred and twenty-five dollars as the actual damage the insolvent estate had suffered by the wrongful and fraudulent acts of the defendant, and for that sum of money and costs the court, as we think, was warranted, in view of all the evidence, in giving judgment in favor of the plaintiff. At best, the defendant can only claim that the evidence was conflicting, and that is not sufficient to overturn the findings of facts in a trial court.

The first specification of errors of law alleged by the defendant is that the court erred in overruling defendant's demurrer to the complaint. The transcript in the case does not disclose that any demurrer was ever filed or overruled in the case; hence, of course, this specification cannot be noticed here. As to the second specification, we think the facts clearly showed that the damages awarded by the court were legal and proper. So as to the third. As to the fourth specification, we think there was no error by the court. As to the fifth, the evidence alleged to have been improperly admitted was, we think, not incompetent, with a view of showing the diligence of plaintiff in endeavoring to utilize the saw-logs, and the difficulties that lay in the way of this desired action. As to the sixth exception, we think it proper to say that, even had it been incompetent, it could not have injured the defendant's cause, nor did it have that effect. As to the seventh exception, the ruling of the court was without error. As to the eighth specification, we think that, even if what followed the word "similar" in the answer of Lang to a question by the defendant's attorney was not strictly responsive to the question, and irrelevant, nevertheless, it could not have had, and did not have, any effect injurious to the defendant. In reference to the ninth specification, we are of opinion that the court rendered such a judgment upon the facts as found as was consistent with them.

For the court to have proceeded outside of the issues made by the pleadings, and ordered a sale of the premises under the mortgage held by the defendant, was not proper. The issue as to the mortgage matter, as made by the pleadings, was whether the conveyance of May 4, 1881, being on its face a deed in fee simple, was, under the facts evidenced in the case, void in toto for fraud or whether it was good as a mortgage

and not void; and upon that issue, as made, the court found properly, in our opinion.

For these reasons we think the judgment of the court, as well as its order denying the motion for a new trial, ought to be affirmed.

We concur: Searls, C.; Belcher, C. C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

LEWIS, Executrix, etc., v. ADAMS.*

No. 9979; August 24, 1885.

7 Pac. 779.

New Trial—Intendments in Favor of Order Granting.—Every intendment is in favor of an order granting a new trial, and it must appear on appeal from the order that prejudicial error or abuse of discretion has been committed, or the order must be affirmed.

A Foreign Executrix cannot Maintain an Action in the Courts of California without first obtaining ancillary letters of administration or testamentary.

Where the Statute of Limitations is Set Up as a Defense, a Finding that "all the allegations of plaintiff's complaint are true" is not a finding as to the issue of the statute of limitations.

APPEAL from Superior Court, Los Angeles County.

Victor Montgomery and Smith, Brown & Hutton for appellant; Thom & Stevens for respondent.

McKEE, J.—Appeal from an order granting a new trial. It is axiomatic in law that on such an appeal the appellant must make it affirmatively appear that error or abuse of discretion has been committed in granting the order. Neither will be presumed. Every intendment is in favor of the order, and unless that is overcome by something in the record of the case upon which the order was made, or unless it has been

*Reversed in bank, 70 Cal. 403, 11 Pac. 883.

made upon some proposition which, considered in itself, is prejudicially erroneous, the order must be affirmed. There is nothing in the record to overcome the presumption in favor of the correctness of the order. On the contrary, the record makes the presumption conclusive. The suit was on a judgment. From the original complaint it appears that the plaintiff was duly appointed by the probate court of Bexar county, in the state of Texas, executrix of the will of Nat. Lewis, deceased; and, in that capacity, she recovered in the district court of said county and state, on the fifteenth day of March, 1877, a judgment for twelve thousand nine hundred and forty-two dollars, and costs against the defendant, P. T. Adams. On that alleged judgment the executrix brought suit in the superior court of Los Angeles county, in this state, against the said Adams, without first obtaining ancillary letters of administration. The suit was commenced on the 15th of February, 1882. On the 8th of July, 1884, more than five years after the date of the judgment, the plaintiff, by leave of the court, amended her complaint by inserting after the word "Adams," in the title of the cause, the names of Joseph Collins, John H. Kennedy and James A. Dalyrample, and by striking out the word "defendant" wherever it occurs in the complaint and inserting instead thereof the word "defendants"; thus alleging a judgment against P. T. Adams, Joseph Collins, John H. Kennedy and James A. Dalyrample, jointly. Adams, by demurrer and answer, resisted recovery on the judgment, on the grounds of (1) incapacity of the plaintiff to sue; (2) nul tiel record; (3) bar of the statute of limitations.

On the trial, the judgment record, given in evidence against defendant's exception, showed that the plaintiff, as executrix of the will of Nat. Lewis, deceased, on the 15th of March, 1877, in the district court of Bexar county, state of Texas, in an action against Adams, Collins & Co., on a partnership liability, recovered judgment for twelve thousand nine hundred and forty-two dollars, and costs, against P. T. Adams, Joseph Collins, James Dalyrample and John H. Kennedy. Adams then proved that he had continuously resided in the state of California since July, 1877, except during a period of about two weeks, when he was absent from the state. On this evidence the court found, "All the allegations of the

plaintiff's complaint, as amended, are true and correct"; did not find upon the issue of the statute of limitations; decided that the plaintiff was entitled to recover against defendant Adams the amount of the judgment, and entered judgment accordingly.

The decision and judgment were erroneous, because (1) the plaintiff, as a foreign executrix, could not maintain an action in the courts of this state without first obtaining ancillary letters of administration, or testamentary. Section 1913, Code of Civil Procedure, declares: " . . . . That the authority of . . . . an executor or administrator does not extend beyond the jurisdiction of the government under which he was invested with authority." The official character of the plaintiff was derived from the letters granted to her in the state of Texas, and as it was confined to the limits of the state it was not recognizable in California; therefore she could not, in that capacity, maintain an action here. If it became necessary for her to sue in this state to recover a debt due to the estate which she was administering in Texas, her first step was to obtain letters of administration from the proper court in this state, by subjecting herself to the regulations prescribed by the laws of the state. Otherwise, her official character cannot be recognized by the courts, and she has no capacity to sue in the courts of the state. (2) The court should have found on the issue of the statute of limitations.

The decision and judgment were therefore properly vacated. Order affirmed.

I concur: Ross, J.

McKINSTRY, J.—I concur in the judgment on the second ground stated in the opinion of Mr. Justice McKee.

GRANGER v. BOURN.

No. 9906; August 25, 1885.

7 Pac. 760.

Corporations.—A Guaranty is Without Consideration Where Founded on an Alleged agreement executed by officers of a corporation, when they have no authority to execute it.

APPEAL from Superior Court, County of Nevada.

Walling & Gaylord and A. W. Thompson for appellant; Cross & Simonds for respondent.

By the COURT.—If the original E. M. & M. Co. had agreed, as a portion of the consideration of the conveyance to it by Bourn of the property conveyed, that it assumed and would pay all debts which he had contracted in and about the affairs of the mine, doubtless such agreement would have authorized the officers of the corporation to assume and agree to pay such debts; and, its obligation to that end being binding upon it, a discharge of Bourn by creditors from liability on such debts would have been founded upon a consideration. But, in the case before us, the alleged guaranty, signed by plaintiff, and the receipt by Watt were without consideration because they were founded on an alleged agreement executed by the officers of the corporation which they had no authority to execute; therefore, the plaintiff received no consideration. He received a piece of paper on which was written, so far as eleven hundred and fifty dollars thereof was concerned, a promise to pay, which promise he, as well as the officers who signed it, were in law presumed to know was of no validity as against the corporation. Such being the case, the receipt and the guaranty constituted no defense to the action on the agreement in suit, and the plaintiff was entitled to recover.

Judgment and order affirmed.

PEOPLE v. MUNN.*

No. 20,068; August 26, 1885.

7 Pac. 790.

Criminal Law—Refusal to Give Instructions not Based on Evidence.—The refusal of a court to give instructions on the law of self-defense, and as to excusable homicide by accident or misfortune, in sudden combat, in a prosecution for murder, is not error if there is no evidence on which to rest such a defense.

*See 65 Cal. 211, 3 Pac. 650.

Homicide—Evidence of Character of Deceased.—In a prosecution for murder, evidence is not admissible on the part of defendant as to the character of deceased for peace and quietness.

Homicide—Testimony of Medical Expert.—**In Prosecution for Murder,** where the theory of the prosecution is that a blow struck by defendant with his fist caused the death, testimony of the medical expert is admissible as to whether, in his opinion, a blow from a man's fist could have produced the fracture which caused the death of deceased.

APPEAL from Superior Court, County of Stanislaus.

On the trial of defendant for murder, his counsel asked the court to instruct the jury on the law of self-defense, and of excusable homicide by reason of accident or misfortune, upon sudden combat. The instruction was refused, because there was no evidence on which such defense could rest. Evidence offered by defendant as to the character of deceased for peace and quietness was also excluded. A medical gentleman was asked by the prosecution whether, in his opinion, a blow of a man's fist could have caused the fracture in decedent's skull. The witness answered that it was very probable.

Wright & Hazen for appellant; the Attorney General for respondent.

By the COURT.—In this cause we have considered the points made on behalf of defendant, and find no error in the rulings of the court in regard to any one of them. Judgment and order affirmed.

COX v. HAYES.

No. 9903; August 26, 1885.

7 Pac. 761.

Ejectment, Recovery in—Strength of Title.—Plaintiff in ejectment must recover on the strength of his own title; and if both parties claim under a common grantor, a prior deed to plaintiff cannot be enlarged by a subsequent deed to the defendant.

APPEAL from Superior Court, Butte County.

Reardon & Freer for appellant; I. S. Belcher for respondent.

ROSS, J.—The only difference between the case as now presented and as presented on the former appeal (64 Cal. 32, 49 Am. Rep. 684, 7 Pac. 785), is that on the last trial the plaintiff was permitted against the objection and exception of the defendant, to put in evidence a deed from Hudson, the common grantor to the defendant of "the northeast quarter of section 16, Tp. 17 N., R. 3 E., excepting therefrom a certain strip of said quarter section, sold by F. R. and A. O. Larkin to A. W. Campbell, and also the easterly one hundred acres of said quarter section, sold by W. K. Hudson to A. Fraser and Thomas Cox."

It was held on the former appeal that the deed from Hudson to Fraser and Cox conveyed only seventy-seven and seventy-one hundredths acres, which excluded the premises in controversy. We know of no principle upon which the former conveyance to the plaintiff can be held enlarged by the subsequent conveyance to the defendant. The circumstance that the deed to the defendant may not have conveyed to him the property in dispute does not aid the plaintiff in this action of ejectment, where the plaintiff must recover on the strength of his own title. Judgment affirmed.

We concur: McKinstry, J.; McKee, J.

CAMPBELL and Others v. JUDD and Others.

No. 9614; August 26, 1885.

7 Pac. 804.

Insolvency—Petition in Insolvency Held Sufficient.[1]

APPEAL from Superior Court, Nevada County.

The petition for insolvency mentioned in the opinion is as follows:

"[Title of Court and Cause.]

"To the Hon. John Caldwell, Superior Judge of said Court:

"The petition of Wilcox & Powers & Co. (a copartnership), Carton, McCarthy & Co. (a copartnership), William Treloar, Theodore Wilhelm, and William Campbell, all residents and citizens of the state of California, respectfully shows that Jas. F. Judd and M. McDonough, copartners under the name and style of 'J. F. Judd,' are indebted to your petitioners as follows: To Wilcox, Powers & Co. in the sum of $346, for goods delivered to them during 1883; to William Treloar in the sum of $6.75, for goods delivered to them during 1883; to Theodore Wilhelm in the sum of $22.95, for goods delivered to them during 1883; to William Campbell in the sum of $251.40, for goods delivered to them in 1883; that all of said debts and demands accrued in this state. And your petitioners further represent that each of said sums are due and unpaid, and have not been assigned to your petitioners in whole or part; that said Jas. F. Judd and McDonough reside in said county, and have permitted their property to remain under attachment for over four days, and that they are insolvent, and have so been before and ever since said attachment was levied on their said property; that the said insolvents have no other property. Wherefore, your petitioners pray that this court issue an order to show cause, at a time and place fixed by this court, why the said J. F. Judd and M. McDonough should

[1] **Cited** and approved in In re Dennery, 89 Cal. 105, 26 Pac. 639, where the petition is held sufficient if that of five or more creditors, representing at least five hundred dollars in all and stating that the demand is for a certain sum which is due for goods sold and delivered by the petitioners to the respondent, at a certain place, within a year past at his request.

not be adjudged insolvents, and the surrender of their estates be made for the benefit of their creditors, in the manner required by insolvent debtors.

"A. BURROWS,
"Attorney for Petitioners.

"[Duly verified.]"

Chas. W. Kitts for appellants; A. Burrows, for respondents.

By the COURT.—Conceding, without deciding, that the appellant has the right to prosecute this appeal, we are of opinion that the record is without error. The contention here is that the petition is defective. We have examined it, and are of opinion that it complies with the requirements of the statute, and is sufficient. Orders affirmed.

POTTER and Others v. ROETH.

No. 8460; August 26, 1885.

7 Pac. 762.

Equity—Rescission of Contract for Fraud.—On the principle that he who seeks equity must do equity the plaintiff, in an action to compel the reconveyance of land, must aver his willingness to restore to the defendant the consideration paid by him.

APPEAL from Superior Court, Alameda County.

Action to compel reconveyance of land. The consideration for the deed of the land was a half-interest in a fruit business, the value of which plaintiffs allege that defendant fraudulently overstated. Complainants failed to aver a willingness that the sale of the interest in the fruit business be set aside and that the same be restored to defendant.

Geo. E. Whitney for appellants; Wm. A. Cornwall for respondent.

By the COURT.—Upon the principle that he who seeks equity must do equity, the demurrer to the complaint should have been sustained. Judgment reversed and cause remanded, with directions to the court below to sustain the demurrer.

JAMES and Another v. FULKERTH.

No. 9599; August 27, 1885.

7 Pac. 768.

Fraudulent Sale of Chattels—Change of Possession.—A sale of chattels not accompanied by an immediate delivery, and actual and continued change of possession, is void as against creditors, and the chattels, the subject of the sale, may be seized on process by the sheriff.

APPEAL from Superior Court, Stanislaus County.

T. A. Caldwell for appellant; Louttit & Lindley for respondent.

FOOTE, C.—Action of claim and delivery for a herd of cattle. There was no conflict of evidence in the case; and it does not appear from it that there was such an immediate delivery and actual and continuous change of possession of the property in controversy, from the vendor to the vendees, as will satisfy the provisions of section 3440, Civil Code. The custody of the herd of cattle remained in the same person after as before the sale, and before they were seized in this action by the sheriff they had not been removed from the land of the vendor, where they were grazing when sold. We are therefore of opinion that the judgment and order of the court below should be affirmed.

We concur: Belcher, C. C.; Searls, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

SMITH v. STROTHER, Auditor, etc.*

No. 11,049; August 27, 1885.

7 Pac. 801.

Shorthand Reporters—Constitutionality of Act of March 21, 1885.—California act of March 21, 1885, relative to compensation of official shorthand reporters, considered, and held that the act was not unconstitutional, nor a delegation of power to the judiciary of legislating in regard to the matter, nor in violation of the county government bill, requiring a uniformity in county governments, nor in violation of article 11, section 6 of the constitution.

APPEAL from Superior Court, City and County of San Francisco.

Wm. M. Pierson and A. L. Hart for appellant; John L. Love for respondent.

ROSS, J.—The last legislature passed an act, approved March 21, 1885, entitled "An act to amend section 274 of an act entitled 'An act to establish a Civil Code of Procedure,' relative to the compensation of court reporters," by which it is provided that the official reporter shall receive as compensation for his services a monthly salary, to be fixed by the judge, by an order duly entered on the minutes of the court, which salary shall be paid out of the treasury of the county in the same manner and at the same time as the salaries of county officers, with a proviso to the effect that such salary shall not exceed three hundred dollars per month in counties having a population of one hundred thousand and over, and shall not exceed two hundred and seventy-five dollars per month in counties having a population less than one hundred thousand and exceeding fifty thousand and so on to and including counties having a population less than five thousand, in which the maximum is fixed at seventy-five dollars per month. The act contains other provisions not important to mention, and further provides that "in civil cases, in which the testimony is taken down by the official reporter, each party shall pay a per diem of two dollars and fifty cents before judgment

*For subsequent opinion in bank, see 68 Cal. 194, 8 Pac. 852.

or verdict therein is entered, and where the testimony is transcribed, the party or parties ordering it shall pay ten cents per folio for such transcription on delivery thereof; said per diem and transcription fees to be paid to the clerk of the court, and by him paid into the treasury of the county, and such portion as shall be paid by the prevailing party may be taxed as costs in the case."

The act is claimed to be violative of the constitution in three respects: First, as "a delegation of legislative power to the judiciary"; second, "in violation of the constitutional provision requiring a uniform system of county governments"; and, third, "because it imposes a new set of officials upon the people, in contravention of section 6 of article 11 of the constitution." Of course, we have nothing to do with the policy of the law, and it is our duty to sustain it, unless we can see clearly that it is in conflict with the paramount law of the state. And this we cannot do. In so far as the right to confer upon the judges the power and duty of fixing the compensation of reporters is concerned, the provisions of the act in question are similar to those of all of the former statutes upon the subject, commencing with the act of May 17, 1861: Stats. 1861, p. 497. Immediately prior to the adoption of the codes, the law with respect to phonographic reporters of the courts in San Francisco was contained in the act of March 13, 1866 (Stats. 1865–66, p. 232), and in the act of March 28, 1868 (Stats. 1867–68, p. 425). Each of those statutes, as well as the provisions of the Code of Civil Procedure, authorized the judge to fix the compensation of the reporter in certain cases. And in Ex parte Reis, 64 Cal. 234, 30 Pac. 806, it was said that whether the acts of 1866 and 1868 or the provisions of the code were to control, the determination of that case was immaterial, as "in either case, just before the adoption of the present constitution, the district court and county court could legally exercise the power of appointing a shorthand reporter, fix his compensation in criminal cases, and order such compensation to be paid, and it was the duty of the treasurer to pay the same upon the order of the court." It is true that the point now made was not made in Ex parte Reis, nor does the constitutionality of the various statutory provisions conferring upon the courts the power of fixing the compensation of reporters seem ever before to have been raised

in this state. In our opinion, the point is not well taken. Phonographic reporters are officers of the court in the same sense that sheriffs and clerks are. They constitute part of the judicial system of the state. The court may fix the fees of referees, commissioners, keepers, etc., in proper cases. Why not of reporters? We see in the act of doing so none of the characteristics of legislation. Nor does it in any manner contravene that provision of the constitution requiring the legislature to establish "a uniform system of county governments." Phonographic reporters are not county officers, and have nothing to do with county governments. They are, as already said, officers of the courts, and constitute a part of the judicial system of the state. Nor does the act in question "impose a new set of officials upon the people, in contravention of section 6 of article 11 of the state constitution." The "officials" referred to in the act of March 21, 1885, were already provided for by law: See Ex parte Reis, 64 Cal. 233, 30 Pac. 806, and the statutes there and hereinbefore referred to. Section 6 of article 11 of the constitution, cited in support of this point of respondent, reads:

"Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns; which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

The framers of the constitution, as we had occasion to say in Staude v. Election Commrs., 61 Cal. 320, meant something when they inserted the provision that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws," and we are not at liberty to hold that they did not mean what they said. Giving, as they did, to all cities and towns, and cities and counties, the right to organize under a general act of incorporation, which

the legislature was directed to pass, or to continue their existence under their existing charters, as they might elect, they nevertheless said that, whichever course should be pursued, such cities and towns, and cities and counties, should be subject to and controlled by general laws—such general laws as should be passed by the legislature other than those for the "incorporation, organization, and classification" of cities and towns. The constitution has provided, in effect, that the city and county of San Francisco shall not be compelled to surrender its present charter for one it does not want; and, further, that its charter shall not be changed by special legislation directly, nor indirectly under the guise of laws relating to cities, or cities and counties, containing a population of more than one hundred thousand inhabitants. At the same time, recognizing the fact that the city and county of San Francisco remains a subdivision of the state, the constitution has said, in effect, that it, as well as all other cities and towns heretofore or hereafter organized, shall be subject to and controlled by such general laws as the legislature shall enact, other than those for the incorporation, organization, and classification, in proportion to population, of cities and towns.

Judgment reversed and cause remanded, with directions to the court below to overrule the demurrer.

We concur: Thornton, J.; Morrison, C. J.

McKINSTRY, J., Concurring.—I concur in the judgment and in the conclusion that the act of March 21, 1885, is valid and operative.

I dissent: Myrick, J.

DORLAND v. BERNAL.

No. 7204; August 28, 1885.

7 Pac. 792.

Remittitur—Motion to Recall to Correct Errors.—A motion to recall a remittitur to enable an examination and correction of errors of the court below, since the remittitur went down, is not a proper way to reach such errors, and the motion will be denied.

Motion to correct remittitur to the Superior Court, City and County of San Francisco.

Moses G. Cobb for appellant; Charles H. Parker for respondent.

By the COURT.—This is a motion to recall a remittitur, to the end that the proceedings of the court below, had since the remittitur went down, may be examined and certain alleged errors corrected. If any errors have been committed, the way now proposed by the mover is not the proper way for reaching them. Motion denied.

WHITESIDES and Others, Executrixes, etc., v. BRIGGS, Executrix, and Another.

No. 9894; August 28, 1885.

7 Pac. 836.

Evidence—Reversal for Insufficiency.—Where Evidence is Substantially conflicting, judgment will not be reversed on the ground of insufficiency of the evidence to justify it.

Findings—On What Matters Necessary.—The Judgment will not be Reversed where there are findings on all the issues because of findings on probative matters outside of the issues.

APPEAL from Superior Court, Los Angeles County.

BELCHER, C. C.—This is an action to set aside a deed to a lot in the city of Los Angeles, upon the ground that it was

obtained by fraudulent misrepresentation. The defendants interposed a general demurrer to the complaint, which was overruled, and then filed separate answers. The case was tried, and findings and judgment entered in favor of the plaintiffs. The appeal is from the judgment and an order denying a new trial.

1. There was no error in overruling the demurrer. The complaint stated facts sufficient to constitute a cause of action, and was certainly good when tested by a general demurrer.

2. The findings are very full and cover all the material issues. The fact that there were findings upon probative matters outside of the issues is no reason for reversing the judgment.

3. A careful reading of the transcript has satisfied us that there was testimony tending to support all of the findings. No useful purpose would be subserved by stating the testimony here. On many points it was conflicting, but when there is a substantial conflict, this court never reverses judgments upon the ground that the evidence was insufficient to justify the decision.

We think the judgment and order should be affirmed.

We concur: Foote, C.; Searls, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

MELLUS v. MELLUS.

No. 9978; September 17, 1885.

8 Pac. 1.

Pleading.—A Party in One Action is not Bound by Allegations in a complaint in another action to which he is not party.

APPEAL from Superior Court, Los Angeles County.

F. H. Howard and J. R. Scott for appellant; David Lyon and Howard & Roberts for respondents.

FOOTE, C.—Action on four promissory notes. Appeal from the judgment for plaintiff, and the order denying defendant a new trial. The complaint stated a cause of action, and the demurrer thereto was properly overruled. From the findings of the court it appeared that recovery on the first note was, as claimed in the answer, barred by limitation under section 337, Code of Civil Procedure. The recitals of facts in those findings negative the existence of all other defenses set up in the answer; and the material issues raised by the pleadings were considered and passed upon. The evidence, although in some respects conflicting, sustains the findings, and they support the judgment. The court reserved its ruling upon an objection made by the plaintiff to the admission in evidence of a complaint filed in another action by E. A. Mellus, assignee of Adelida Alexander, against Lalla Mellus, and which the defendant claims has never been ruled upon. A ruling should have been made upon that objection, but the defendant here suffered no injury. That complaint was incompetent as evidence in this action. Its allegations were not binding on the plaintiff here. It was filed in an action which was dismissed before that at bar was brought. The parties to the two actions were not identical.

The fifth point made by the defendants for the first time in this court should not be considered.

The record shows no error and the judgment and order should be affirmed.

We concur: Searls, C.; Belcher, C. C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

McKINNEY v. ROBERTS.*

No. 9342; September 23, 1885.

8 Pac. 3.

Slander—Allegations on Information and Belief.—In an action for slander it is not a sufficient averment of the speaking of slanderous words to allege that at a certain time, in the presence of certain persons, "as the plaintiffs are informed and believe," the defendants spoke the words complained of; and the defect in the complaint arising therefrom goes to the sufficiency of the facts stated, and not to the manner of stating them, and may be taken advantage of by a general demurrer.

Slander—Cost Bill.—Counsel Fees are not Recoverable in an action of slander by a defendant in whose favor a judgment is rendered, unless such fees are included in his memorandum of costs.

APPEAL from Superior Court, Stanislaus County.

SEARLS, C.—Plaintiffs are husband and wife, and this is an action to recover damages for slanderous words alleged to have been spoken of and concerning the latter by defendant. A demurrer to the complaint was sustained, and, plaintiffs declining to amend, final judgment was rendered in favor of defendant for one hundred dollars counsel fees, as provided by section 7 of an act concerning actions for libel and slander, approved March 23, 1872, and for costs in the sum of seven dollars and seventy-five cents. A memorandum of costs was made out, served and filed, as required by section 1033 of the Code of Civil Procedure, but which did not include the one hundred dollars allowed by the court as a counsel fee.

Appellants claim that the court erred, first, in sustaining the demurrer to the complaint; and, second, in including the sum of one hundred dollars as counsel fees in the judgment, the same not having been mentioned in the memorandum of costs as filed.

The language complained of is set forth in the complaint as follows:

"(2) That on the first day of March, 1883, as the plaintiffs are informed and believe, at the county of Stanislaus, the

*Reversed in bank. See 68 Cal. 192, 8 Pac. 857.

defendant, addressing William Walker, spoke, in the presence of said William Walker and George M. Dewel, the following words, to wit: 'If you wish to see or talk to any woman go over the river and talk to your paramour, Mrs. W. McKinney. By God, sir, she is over at my house visiting to-day.'

"(3) That said words were spoken concerning the plaintiff Susan McKinney.

"(4) That said words were false, except that the said plaintiff Susan McKinney was at the house of said defendant on said day visiting."

The allegation of the complaint is:

"That on the first day of March, 1883, as the plaintiffs are informed and believe, at the county of Stanislaus, the defendant, addressing William Walker, spoke, in the presence of said William Walker and George M. Dewel, the following words, to wit."

"Plaintiffs are informed and believe defendant spoke certain words." Is this a sufficient averment of the speaking? Plaintiffs might have been informed, and might have believed, the defendant to have spoken the words as charged, and yet it may not have been true. Would proof that they were so informed, and that they thus believed, be sufficient to sustain an action? We think not. If denied, the proofs should show the words to have been spoken by the defendant, or the action must fail. No amount of proofs that plaintiffs were informed defendant had thus spoken, and that they believed it, would suffice to establish the fact. The allegata and probata should concur. The averments of the complaint should be as precise and specific as the proofs are required to be. The language used does not exclude the hypothesis that defendant did not speak the words. It may all be true, and the defendant be entirely innocent. Had plaintiffs stated that, upon information and belief, they averred defendant spoke the words in question, quite a different proposition would be presented. Suppose defendant had failed to answer, what would have been the effect of admitting the allegations of the complaint? Why, simply that plaintiffs were so informed, and not that it was true, but that they believed it to be true. We think the defect goes to the sufficiency of the facts stated, and not to the mode of stating them, and therefore that it can be reached by a general demurrer, and that for this reason the demurrer was properly sustained.

2. As to the action of the court in including the counsel fee in its judgment, the same not having been included in the memorandum of costs filed. The order of the court was that defendant have judgment for his costs, and thereupon the clerk seems to have entered the judgment for not only the amount included in the cost-bill, but also for the counsel fee of one hundred dollars. Section 7 of the Statutes of 1871–72, page 533, provides as follows: "In case the action is dismissed, or the defendant recover judgment, he shall be allowed one hundred dollars to cover counsel fees, in addition to the other costs, and judgment therefor shall be entered accordingly."

This court construed the above section in Jacobi v. Baur, 55 Cal. 554, and held it did not have the effect of entitling a party to recover, except in those cases where, under the Code of Civil Procedure, he became entitled to costs; and accordingly held that in a case for slander a plaintiff who recovered less than three hundred dollars was not entitled to one hundred dollars to cover counsel fees. It is allowed to cover counsel fees in addition to the other costs. Treating it as costs, it becomes necessary that the amount thereof should be included in the memorandum filed, pursuant to section 1033 of the Code of Civil Procedure. Not having been included in the cost-bill as filed, it was waived.

We think the judgment of the court below should be modified by striking out the sum of one hundred dollars allowed as counsel fees, and that in all other respects it should be affirmed.

We concur: Foote, C.; Belcher, C. C.

By the COURT.—For the reasons given in the foregoing opinion the judgment is ordered modified by striking therefrom the sum of one hundred dollars allowed as counsel fees, and in all other respects the judgment is affirmed.

GIRDNER v. BESWICK.*

No. 9843; September 24, 1885.

8 Pac. 11.

New Trial—Waiver of Notice of Decision.—Where a losing party files and serves a notice of intention to move for a new trial, he is presumed to have waived notice of the decision.

New Trial—Time of Filing Notice.—A notice of intention to move for a new trial must be filed within the time limited by statute (Code Civ. Proc., sec. 659) or it will be unavailing.[1]

APPEAL from Superior Court, Siskiyou County.

Wm. I. Nichols and H. B. Warren for appellant; Wm. McConaughy and J. V. Brown for respondents.

FOOTE, C.—The plaintiffs recovered judgment in the court below for two thousand dollars damages for breach of contract. The defendant's counsel in their brief contend that proper notice of an appeal was given from the judgment of the court below, as well as from its order denying a new trial. We do not so understand that notice, and are of opinion that by no fair interpretation can it be held to include notice of appeal from anything except the order made by that tribunal overruling and denying the defendant's motion for a new trial; and the sole question now to be considered by this court is whether or not there exists any merit in the appeal from that order. There were two notices of intention to move for a new trial. The first one, in point of time, was duly and legally filed and served. From the filing and service of that notice the defendant is presumed to have waived that of the decision in the cause: Cottle v. Leitch, 43 Cal. 322. With the exception of the serving, settling, filing, and certifying of a statement, no further action on that motion for new trial was

*For subsequent opinion in bank, see Girdner v. Beswick, 69 Cal. 112, 10 Pac. 278.

1 **Cited** and followed in Burton v. Todd, 68 Cal. 487, 9 Pac. 664, where it is held, nevertheless, that the court may, on application, extend the time provided the order so extending is itself made before the expiration of the statutory time.

had in the court below. It would serve no useful purpose to declare what effect, even if it be considered as pending and undecided, the first has upon the second motion for a new trial, for the reason that the notice of intention for the latter was not filed until August 16, 1884—too late to meet the statutory requirement of section 659, Code of Civil Procedure, the decision in the cause having been made and filed on the 7th of March preceding: Hook v. Hall, ante, p. 459, 6 Pac. 422.

The order appealed from should be therefore affirmed.

We concur: Searls, C.; Belcher, C. C.

By the COURT.—For the reasons given in the foregoing opinion the order is affirmed.

KELLY v. BROWN.

No. 9908; September 26, 1885.

8 Pac. 38.

Appeal—Findings—Effect Where Evidence Doubtful.—Where, on appeal, there is no conflict in the evidence, but rather a question as to the correctness of the findings on the testimony introduced at the trial, and the testimony will allow of a reasonable difference of opinion as to the facts to be deduced therefrom, the judgment of the lower court will not be disturbed.[1]

APPEAL from Superior Court, Modoc County.

T. F. Ewing and C. L. Claflin for respondent; E. V. Spencer for appellant.

SEARLS, C.—This is an action for the recovery of personal property, and was tried by the court without a jury.

[1] Cited with approval in Bettens v. Hoover, 12 Cal. App. 318, 107 Pac. 331, in a case of unlawful detainer, where the court said: "Where fair and impartial minds may draw different conclusions from the evidence, though there be no conflict in the testimony, it is a case for the jury or trial court to decide."

Defendant had judgment, and plaintiff prosecutes this appeal. Defendant introduced no testimony in the court below. The question presented is not one where there is a conflict of testimony, for there was no conflict, but rather a question of the correctness of the findings on the testimony introduced. The testimony of plaintiff, who was the principal witness in his own behalf, is not as full and clear on the several points to which he spoke as could be desired. Upon all the testimony presented, we should feel inclined, were the case submitted to us as an original proposition, to find that the transactions in evidence constituted a sale in praesenti, and not a contract for a sale, but some deference should be paid to the action of the court who heard the testimony, whose opportunity to arrive at a correct conclusion as to the facts was somewhat superior to our own. In this view, and regarding the case as one in which a difference of opinion may reasonably exist as to the facts to be deduced from the evidence, we are of opinion the judgment and order denying the motion for a new trial should be affirmed.

We concur: Foote, C.; Belcher, C. C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

PEOPLE v. LOWDEN.

No. 11,002; September 28, 1885.

8 Pac. 66.

Quo Warranto—Usurpation of Franchise—Answer.—In quo warranto proceedings for usurpation of a corporation franchise, if the verified complaint alleges facts showing the illegality of the pretended corporation, such facts must be specifically denied by the answer, and a denial of the legal conclusions drawn from the facts merely, is not sufficient.

Corporation—Pleading—Legal Conclusions.—An allegation in a pleading that a corporation was duly, regularly, and legally formed, and that it has continued to act as such, is a mere averment of a legal conclusion and raises no issue.

Quo Warranto—Usurpation of Franchise—Burden of Proof.—In a proceeding for usurpation of franchise of a corporation, the burden of proof is on the defendants to show that the corporation was legally formed, and that its existence is legal, and in such proceeding the answer should set forth the facts showing the same.

Quo Warranto—Prior Proceedings a Bar.—Proceedings brought by the attorney general to determine the rights of defendants to exercise a franchise as a corporation are not barred by a prior application for a writ of mandate to compel a board of supervisors to fix rates of toll to be taken on a road claimed by the alleged corporation.

Quo Warranto—Maintenance by Attorney General.—Estoppel.—The fact that the person on whose relation the proceeding of quo warranto, for usurpation of a corporate franchise, was instituted was at one time acting as an officer of the alleged corporation, will not operate as an estoppel against the maintenance of the action by the attorney general.[1]

APPEAL from Superior Court, County of Trinity.

W. J. Tinnin for appellants; J. W. Phillbrook, Jackson Hatch and E. C. Marshall, attorney general, for respondent.

BELCHER, C. C.—This is an action in the nature of quo warranto, brought in the name of the people by the attorney general, on the information of one Fordyce Bates, to obtain a judgment that the defendants were usurping, intruding into, and unlawfully holding a certain franchise to collect tolls under a pretended wagon-road corporation. The defendants demurred to the complaint, on the ground that Fordyce Bates was one of the original organizers and owners of the wagon-road company, and was estopped from making the complaint and from denying the legitimate existence of the corporation he helped to make. The demurrer was overruled, and the defendants then answered. When the case came on for trial the plaintiff moved the court for judgment on the

[1] **Cited** and approved in People v. Stanford, 77 Cal. 368, 2 L. R. A. 92, 19 Pac. 696, but distinguished from a case in which persons attempting to form a corporation are made joint parties with the thing attempted to be formed, alleged to be no corporation by reason of illegality, as defendants.

Cited and approved in People v. Bass, 15 Cal. App. 66, 113 Pac. 697, which was an election contest in which it was sought by the defense to commit the plaintiff by a certain pre-election "consent" by the actual contestant, on the principle of estoppel.

pleadings, and the motion was granted. The appeal is from the judgment so entered.

The complaint set forth at length the steps taken to form the supposed corporation, and the various requirements necessary to be observed in forming such corporations under the statutes which authorized their formation, and then alleged that there was a failure to comply with the requirements of such statutes:

"That all the proceedings hereinbefore set out and referred to touching the formation, organization, and establishment of said pretended corporation were wholly fictitious and in bad faith; that nine persons did not sign said declaration of intention to organize such pretended corporation, but that a majority of the names signed thereto were signed by the persons referred to in allegation number two herein, without the knowledge or consent of such persons whose names were so signed. Said declaration of intention was never published in any newspaper at all, nor was it ever posted at all. No survey of a route was ever made by Nelson Hosmer, or anybody else, for or on behalf of said pretended corporation. No capital stock whatever was ever subscribed by anybody at all to said pretended corporation; nor was any money at all ever paid into said pretended corporation by anybody at all; nor was any number or valuation of shares of capital stock ever fixed by said pretended corporation; nor was any preliminary organization of said pretended corporation ever made or had; nor was any certificate ever filed as required by said acts; nor was any copy of the original declaration of intention, or a certificate of the election of officers and of the corporate name, filed in the county recorder's office of said county."

The complaint further alleged: "That if said pretended corporation ever did have any legal or proper standing, it became and was fully and wholly dissolved in the year 1873, upon the expiration of ten years; that defendants have, for a year last past, been using and exercising all the privileges and rights and the franchise of a corporation duly formed, organized, and established under the provisions of said acts of the legislature, and duly extended in its duration under section 401 of the Civil Code of this state, under and by virtue of said

pretended corporation, and have seized and taken possession of a public highway, duly and regularly established, ... and are collecting tolls from travelers passing over said road, and claim to be the successors in interest of those who took the steps and proceedings hereinbefore set out and referred to; that under said pretended corporation, the franchise of a corporation legally formed, organized, and established under said acts, and extended under said section of the Civil Code, is now, and for a year last past has been, usurped, intruded into, and unlawfully held, and exercised by the defendants."

The defendants in their answer deny that the corporation named "is an illegal corporation; deny that they have at any time usurped, intruded into, or illegally held any franchise or corporation; deny that they have at any time seized or taken possession of any public highway; deny that they have collected tolls on any public highway; deny each and every allegation of the plaintiff's complaint as to the irregularity or illegality of the organization of the corporation called . . . . ; deny each and every allegation of the plaintiff's complaint as to the illegal existence of" the corporation named, "as a corporation, since the year 1873, or that it illegally existed at any time since the year 1863." They then allege that the company "is now a corporation duly, regularly, and legally organized under the laws of the state of California, and has for and during the twenty years last past, and over, continually been such corporation in good faith, and acting as such corporation, by owning, controlling, keeping in repair and collecting tolls on its wagon road, ... that said corporation was duly organized in the year 1863, under the laws of the state of California, and continued under said organization until the month of June, 1877, when the owners of said corporation, its franchise and property, under and by the laws of the state of California, as they, the said laws, were in June, 1877, continued and extended the existence of the said corporation for the period of fifty years." They then allege that "they, and each of them, are part owners and officers of the said corporation, and that all acts done by them in the premises are done in obeyance of and by direction of the officers of said corporation."

It is clear that the denials found in the answer raise no issues. The first four are denials of averments in the complaint which are mere conclusions of law from the facts stated: Pomeroy on Remedies, secs. 637, 638. The last two are general denials. The answer was verified as required by the code (Code Civ. Proc., sec. 446), and in a verified answer general denials are inadmissible and may properly be stricken out: People v. Hagar, 52 Cal. 182.

The affirmative averments state conclusions of law and not facts. It is alleged simply that the corporation was duly, regularly, and legally formed, and that it has continued to act as such in good faith for more than twenty years, and that in 1877 the owners of its franchise and property, under the laws of the state, continued and extended its existence for fifty years. This is not enough. In a proceeding like this the burden is on the defendants to show that the corporation was legally formed and that its existence has been legally extended, and to that end they must set forth in their answer the facts showing such formation and extension: High, Extr. Rem., sec. 712.

The defendants pleaded in bar of the action a judgment rendered by the superior court of Trinity county, in a case wherein the corporation in question was plaintiff and the board of supervisors of that county was defendant. But that was an application for a writ of mandate to compel the board of supervisors to fix the rates of tolls to be taken on the road claimed by plaintiff, and the right of the plaintiff to exercise the franchise, which it claimed could not, in that proceeding, be inquired into: Weaverville & M. W. R. Co. v. Board of Supervisors, 64 Cal. 69, 28 Pac. 496.

It is clear, therefore, that the judgment in that proceeding could not be a bar to this.

The defendants also alleged in their answer that "Fordyce Bates, the informant and complainant herein, is estopped from giving this information or making this complaint," for the reason that he was one of the original organizers of the company; one of its first directors and one of its first shareholders, as shown by the complaint; and for the further reason that in 1879, 1880, and 1881 he was a member of the board of supervisors of the county of Trinity, and voted for, aided, and assisted to fix the rates of toll for said corporation on the said

toll-road, and by his acts induced the defendants to believe that the company was a just and legal corporation; and that in March, 1881, he represented that he "knew the said corporation was a good corporation," and thereby induced one of the defendants to buy its franchise and property for himself and his then associate.

The attorney general may commence an action like this upon his own information, or upon the complaint of a private party, and he must commence it whenever he has reason to believe that a franchise has been usurped, intruded into, or unlawfully held or exercised by any person: Code Civ. Proc., sec. 803. The action is commenced in the interest of the public, to redress wrongs which injuriously affect the public. If the defendants have usurped and are unlawfully exercising a franchise, why should an action commenced to redress the wrong be barred because of any prior acts or misrepresentation of the informant? No case of a similar character has been called to our attention where the doctrine of estoppel has been invoked, and we fail to see how it can be invoked here. The other points need not be mentioned.

On the whole, we think the judgment and order should be affirmed.

We concur: Searls, C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

PEOPLE v. DEVON.

No. 20,093; September 28, 1885.

8 Pac. 93.

Criminal Law—Sending False Telegram.—A conviction of the crime of sending a false telegram is erroneous, and cannot be sustained, if from the evidence it appears that the defendant had not the slightest idea that he was deceiving the person to whom the message was sent, and that the person to whom the message was sent was not deceived.

APPEAL from Superior Court, San Joaquin County.

J. A. Louttit and S. D. Woods for appellant; E. C. Marshall, attorney general, for respondent.

By the COURT.—The defendant was convicted under section 474, Penal Code, of the crime of willfully sending a false message by telegraph, with the intent to deceive the person named in the information. The testimony clearly shows, without conflict, (1) that the defendant had not the slightest idea he was deceiving the person to whom the message was sent; (2) that the person to whom the message was sent was not deceived.

Judgment and order reversed and cause remanded to the superior court of San Joaquin county for a new trial.

McKee, J., expressed no opinion.

EVANS v. ROSS.

No. 9188; September 30, 1885.

8 Pac. 88.

Waters.—Actions to Restrain the Diversion, Obstruction, and Use of waters of a stream, and for damages for the same, are suits in equity to abate nuisances.

Equity—Verdict of Jury.—In a Suit in Equity, the Court may Order a jury, though the party is not entitled thereto; but, in such case, the verdict of the jury on the issues submitted by the court is advisory only, and it may be adopted or rejected by the court. A general verdict is insufficient, and a refusal to instruct a jury in such cases to find a general verdict is not error.

Waters.—Five Years' Adverse Possession is Sufficient to Bar an Action to enforce a water right.

Waters—Diversion of Water—Joint Action for.—Where each of two defendants made diversion of water for his own benefit, separately from, and without any collusion, arrangement, or understanding with, his codefendant, and without any consent or joint action between them, a joint action to recover damages for such diversion is not maintainable against them.

APPEAL from Superior Court, County of Lassen.

E. V. Spencer for appellants; J. D. Goodwin for respondents.

THORNTON, J.—This is an action to recover damages for the obstruction, diversion, and use of the water of a stream, and for an injunction restraining defendants from continuing such obstruction, diversion, and use. The court below, on the trial, submitted a number of special issues to a jury, which were answered by it. Before the jury retired, counsel for plaintiff demanded of the court that the jury be allowed to bring in a general verdict, in addition to the verdict on the special issues submitted. This the court refused, and plaintiff excepted.

The court did not err in refusing the demand of plaintiff. The case is one in equity. This was so held in Courtwright v. Bear River etc. Min. Co., 30 Cal. 576, Yolo Co. v. Sacramento, 36 Cal. 193, and Learned v. Castle, 67 Cal. 41, 7 Pac. 34. In Yolo Co. v. Sacramento, the court used this language: "But we do not consider that the abatement of a nuisance, and the recovery of damages therefor, are distinct causes of action in the sense of the rule invoked by the demurrer. The nuisance is the cause of action. The abatement and damages therefor are merely different kinds of relief to which the plaintiff may be entitled."

In the case under consideration, the prayer is for an injunction enjoining and prohibiting the defendants, etc., from in any way obstructing or diverting the waters of said creek, etc. The prayer is not in so many words for removing and abating a nuisance, but equivalent words are used. Under such a prayer, a mandatory injunction could be granted for abating the obstruction of the water by a removal of it. With this form of prayer we hold it to be an action for abating a nuisance; and that the diversion of a watercourse is a nuisance was held in Tuolumne W. Co. v. Chapman, 8 Cal. 392. See, also, Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310. It is well settled that a party is not entitled to jury in an equity case. It is in the discretion of the court in such a case to call a jury. When a jury is called, the court directs proper issues to be framed and submitted to it. The verdict on

these issues is only advisory to the court, and it may adopt the findings of the jury, or reject them and itself find the facts: Warring v. Freear, 64 Cal. 56, 28 Pac. 115. A general verdict is insufficient and should be disregarded: Brandt v. Wheaton, 52 Cal. 430.

By reason of what is said above, the court did not err in its ruling as to a general verdict. It also follows from what is said above that the court did not err in setting aside the verdict of the jury and finding the facts itself. Neither did it err in denying plaintiff's motion for judgment on the verdict. The findings sustain the judgment in favor of defendant Ross. The twenty-third finding is as follows: "That since the year 1862, until the commencement of this action, defendant Ross has continuously and uninterruptedly, during the irrigating season of each year, so long as there was sufficient water in the creek, diverted and used the said water of said creek, to the extent of one hundred and forty-nine inches measured under a four-inch pressure, through the dams and ditches heretofore described, on the west side of said creek; that he has used the same for irrigating his said lands as before described, claiming all the time the right to do so as against the whole world; that such diversions, use, and claim of right have been with the full knowledge of plaintiff and his grantors. I find, also, that Ross' use of water has been adverse and hostile to plaintiff, and an injury to plaintiff. I find further that plaintiff and his grantors have never allowed five days to elapse without protesting and objecting to the same."

That an action to enforce the right to water can be barred by five years' adverse possession we consider settled in this state by the cases of Union Water Co. v. Crary, 25 Cal. 509, 85 Am. Dec. 145, and Davis v. Gale, 32 Cal. 35, 91 Am. Dec. 554. In the case first cited from 25 Cal., the court used this language: "The right of the first appropriator may be lost, in whole or in some limited portions, by the adverse possession of another. And when such person has had the continued, uninterrupted, and adverse enjoyment of the watercourse, or of some certain portion of it, during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him."

The finding above quoted shows a use and diversion of the water of the stream in controversy by defendant Ross, for irrigating his lands during the irrigating season, for more than five years before the commencement of the action, continuously and uninterruptedly during such season in said years, to the extent of one hundred and forty-nine inches under a four-inch pressure, through the dams and ditches mentioned in the finding; that this use was made under a claim of right adverse and hostile to the plaintiff; that this use and diversion were made with the knowledge of the plaintiff, and were injurious to him. We think that this finding determines the defense of the statute of limitations in favor of defendant Ross to the extent of the one hundred and forty-nine inches under a four-inch pressure above mentioned.

We find no error in the judgment against Ross. The same is true as to defendant Williams. The plaintiff was entitled to the injunction against Williams awarded by the judgment. But it is contended that, inasmuch as the court found that plaintiff was damaged by the acts of Williams to the extent of seven hundred and fifty dollars, he is entitled to judgment against Williams for that amount. In answer to this, we have to say it was pleaded by Williams that he was improperly joined as a defendant with Ross in this: that the use and diversion of the water made by him was made for his own benefit, separately from, and without any collusion, arrangement, or understanding between him and his codefendant, and without any consent of, or joint action between, them. The court found that all the acts done by defendants (referring to the acts of use and diversion of water) were done while acting severally and not in concert or collusion. The damage caused by each defendant was several, and no action could be maintained against them jointly for it.

We find no error in the record and the judgment is affirmed.

I concur: Morrison, C. J.

MYRICK, J., Concurring.—I concur in the foregoing opinion (and in the judgment) in all respects, except where it is held that the diversion of water is a nuisance. On that point I express no opinion. That the case is one in equity I have no doubt.

I concur in the judgment: Ross, J.

REYNOLDS v. REYNOLDS.

No. 8849; October 10, 1885.

8 Pac. 184.

Appeal—Reversal—Restitution by Losing Party.—Where, on appeal, a judgment is reversed, the appellate court will not compel restitution by the losing party of money which was not paid after, or in consequence of, the judgment appealed from, but was paid in consequence of an order made prior to the judgment, which order was not appealed from.

Motion for order for restitution.

Langhorne & Miller for appellant; J. D. Sullivan and D. H. Whittemore for respondent.

MYRICK, J.—Motion for an order for the repayment of money under section 957, Code of Civil Procedure. When the case was before us on appeal from the judgment (67 Cal. 176, 7 Pac. 480), we reversed that part of the judgment which directed the payment of one thousand dollars counsel fees by the defendant to the attorneys for the plaintiff; the action being for a divorce. It does not appear, from the affidavits used on the motion, that the money was paid after, and in consequence of, the judgment appealed from. If the money was paid in consequence of an order made prior to the judgment, such order was not appealed from. Motion denied, and order staying remittitur vacated.

I concur: Morrison, C. J.

THORNTON, J., Concurring.—I concur in the denial of the motion herein, on the ground that the motion authorized by section 957, Code of Civil Procedure, is one against a party to the action, and not one, as this is, against the attorneys of a party.

HORTON v. DOMINGUEZ.

No. 11,178; October 14, 1885.

8 Pac. 273.

Appeal.—A Transcript on Appeal is Filed Within the Time prescribed by rule 2 of the supreme court if filed on August 5, 1885, where the notice of appeal was filed on June 3d of the same year, and the bill of exceptions settled on July 1st, and filed July 2d.

APPEAL from Superior Court, Ventura County.

Motion to dismiss appeal under rule 2 of the supreme court, which reads as follows:

"Rule 2. Transcript. The appellant in a civil action shall, within forty days after the appeal is perfected, and the bill of exceptions and the statement (if there be any) are settled, serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken."

The transcript in this case was filed August 5, 1885. The notice of appeal had been filed on June 3, 1885, and the bill of exceptions was settled on July 1, 1885, and filed July 2, 1885.

Hall & Hamer for appellant; Blackstock & Shepherd for respondents.

By the COURT.—The transcript was filed within the time prescribed by rule 2 of this court. The motion to dismiss the appeal is therefore denied.

HIRSCHFELD v. SUPERIOR COURT OF TULARE CO.

October 14, 1885.

8 Pac. 273.

Certiorari—Settlement of Administrator's Account.—Where an administrator's first annual account is settled, an order that such account should be again gone into, in connection with the second annual account of the administrator, cannot be reviewed on certiorari, as it involves no question of jurisdiction of the lower court.

Certiorari to review an order that on the settlement of an administrator's second annual account the first annual account, which had already been settled, should be gone into again in connection with the second.

Wal. J. Tuska for the petitioner.

By the COURT.—Petition for writ of review. The case as presented by the petition does not involve any question of jurisdiction in the court below; therefore the petition is denied.

LUCO v. COMMERCIAL BANK OF SAN DIEGO.*

No. 11,016; October 14, 1885.

8 Pac. 274.

Partition.—Unless Notice of an Appeal from an Interlocutory Decree in partition is served upon all the adverse parties the appeal will be dismissed.

APPEAL from Superior Court, San Diego County.

A. B. Hotchkiss for appellant; Levi Chase, W. J. Hunsaker and Thomas J. Arnold for respondent.

*For subsequent opinion, see 70 Cal. 339, 11 Pac. 750.

By the COURT.—A motion is made to dismiss the appeal, which is from an interlocutory decree in partition, on the ground that the notice of appeal was not served on all of the adverse parties. As the notice was not so served, the motion must be granted. Ordered accordingly.

ALPERS v. KNIGHT.

No. 8920; October 31, 1885.

8 Pac. 446.

Specific Performance—Allegations of Complaint.—In an action to specifically enforce a contract for the sale of land, the allegations of performance by the vendee in the complaint held sufficient.

Vendor and Vendee—Effect of Contract for Sale of Land.—Under a contract for the sale of land a deed from the vendee transfers the equitable title to the grantee, and entitles him to demand a conveyance from the vendor or from subsequent purchasers without notice.

APPEAL from Superior Court, City and County of San Francisco.

J. G. Severance for appellant; Preston & McPike for respondent.

By the COURT.—The defendant's demurrer to the complaint was sustained, and final judgment passed in the superior court in favor of defendant. From this judgment plaintiff has appealed.

As we understand the agreement set forth in the complaint it was agreed by Frederick G. Smyth that Joseph L. Reed should be entitled to conveyance of one-third of all the lands devised to said Smyth "upon the full and complete performance of the stipulations" by Reed and wife, agreed and covenanted to be done and performed, and when and after all claims, costs, and debts against the estate of Peter S. McNeil should be paid. The complaint alleges that "all claims against, debts owing and payable by, and costs and expenses

of every kind and character in any manner incurred in and about, the said estate of Peter S. McNeil, deceased, and in the administration thereof, were fully paid and discharged by the said administrator of said estate, out of the moneys alone belonging to said estate, and in the hands of said administrator, who thereupon filed his final account," etc. Further, that all the stipulations covenanted and agreed to be performed by Joseph L. Reed and Catherine C., his wife, in the agreement between them and Smyth were by them fully and completely performed. The complaint also avers that four hundred and twenty-five dollars, paid in conformity to said agreement, was less than one-third of a balance of the sum received by Smyth from the special administrator, Mayer. The complaint also shows that defendant had notice of the agreement above referred to when he took his deed from Smyth. The subsequent deed from Joseph L. Reed to plaintiff transferred the equity of the former and gave the latter the right to demand a conveyance from defendant.

Judgment reversed and cause remanded, with direction to the court below to overrule the defendant's demurrer.

CRAVEN v. NOLAN.

No. 8859; November 19, 1885.

8 Pac. 518.

Nonsuit.—It is Error to Grant a Nonsuit Where the Plaintiff Gives Evidence tending to sustain the issues presented in the complaint.

APPEAL from Superior Court, County of Stanislaus.

Wright & Hazen for appellant; W. E. Turner for respondent.

By the COURT.—There was evidence given on behalf of plaintiff tending to sustain the issues presented in the complaint; therefore the court erred in granting the motion for

nonsuit. The evidence should have been submitted to the jury. Judgment reversed, and cause remanded for a new trial.

PEOPLE v. SULLIVAN.

No. 20,091; November 19, 1885.

8 Pac. 520.

Homicide—Admissibility of Declarations of Deceased.—In a prosecution for murder, the admission of declarations of deceased, made after receiving the injury, will not warrant a reversal if they are not calculated to prejudice the defendant, although they are not properly dying declarations, nor part of the res gestae.

Homicide—Expert Testimony as to the Nature of Wounds.—A witness who testifies that he has had experience with wounds, and is able to tell from seeing them what they were made with, though not a professional expert, may testify as to whether, in his opinion, a wound was inflicted with a dull or sharp instrument.

Criminal Trial—Refusal of Instructions Substantially Given.—It is not error to refuse to give an instruction if the same has already been given in other instructions.

APPEAL from Superior Court, County of Fresno.

Campbell & Hinds for appellant; E. C. Marshall, attorney general, for respondent.

MORRISON, C. J.—The defendant was convicted of the crime of murder in the second degree, and adjudged to suffer imprisonment therefor the term of twenty-five years. On this appeal he makes the following points:

(1) The court erred in admitting the declaration of deceased. (2) The court erred in admitting the testimony of H. J. White, who claimed to be an expert, as to whether the wound had been inflicted with a dull or sharp instrument. (3) The court erred in refusing to give an instruction asked by the defendant, upon the hypothesis that his testimony was true.

1. The following is the testimony objected to under the first alleged error:

"Counsel for the people asked the following questions, upon which the court made the ruling that follows: Question. Did he (deceased) say anything about sending for a doctor while in that condition? Answer. Yes; I will tell you. Q. Just state what he said about sending for a doctor. Mr. Hinds, Counsel for Defendant: We object to it on the ground that it is incompetent and not admissible as a dying declaration, or as a part of the res gestae. Mr. Harris (for the People): We want to show that the deceased asked them if they had sent for a doctor, and they said no, but they would; and he said it was no use—they couldn't do him any good. We want to establish the foundation for introducing other declarations. Does the court admit the question? Court: Yes. Mr. Hinds: We take an exception. Mr. Harris: State what he said about sending for a doctor, first. A. He asked if we sent for a doctor. He was told no, but there would be a doctor there as soon as possible. Says he, 'I don't think it is necessary; I don't think a doctor will do me any good.' Q. Did he say anything else in that conversation? Counsel for Defendant: We object to any declarations, on the ground that they are incompetent, not dying declarations, or a part of the res gestae. Court: Same ruling and same exception. Q. Go ahead. A. He asked if he was hurt. He was told he was. Q. How he got hurt? A. He was not told how he got hurt. And then he says, 'Have you sent for a doctor?' They said there would be a doctor there as soon as we could get him there. He says, 'I don't think it is necessary, because I don't think he could do me any good'; and then asked if we had any morphine, and they said no. He died about an hour and a half—about two hours, I guess—after he said these words. Q. He asked how he got hurt? A. Yes, sir."

Even if it be conceded that the foregoing testimony was improperly admitted, there is nothing in it calculated to prejudice the defendant, and if error was committed by the court in admitting it, it was error without injury.

2. The second alleged error relates to the testimony of H. J. White. The witness, after fully describing the wounds found on the person of the deceased, and after testifying that he had had experience in seeing very frequently cut wounds, and was well acquainted with wounds made with a sharp instrument, and blunt ones also, said: "I have been

here since 1849, and have seen a great deal of this kind of work. From my experience I am competent to tell from seeing a wound what it was made with." He was then asked by the counsel for the people as follows:

"Mr. Harris: Did that wound [meaning a wound he had described] have the appearance of being done by a sharp instrument or a dull instrument? S. J. Hinds, Counsel for Defendant: We object to the testimony on the grounds—First, that he is not shown to be a professional expert on wounds; second, that, granting that he is an expert on wounds, it is incompetent for a man looking at a wound to give his opinion as to how it was caused, whether he speaks professionally or otherwise; he can state the facts, but he can't state his opinion. The Court: The court will overrule the objection. Mr. Hinds: We except."

In answer to the question the witness stated that the wound had the appearance of being done with a dull instrument. The same witness testified to having found blood and gray hairs on the blunt end of the ax found near the place of killing—that is, the hairs were found on what was called the pole of the ax, and the blood on the handle—and the wound, being testified to, was located by witness as having been found on the head of deceased, who had black and gray hair.

We do not see, in view of all the circumstances in evidence in the case, how the defendant could have been injured by the testimony complained of, for he made a full statement of the facts attending the homicide, between which statement and the testimony of White there is no conflict. But we are of opinion that the witness White was a competent witness in respect to the matter on which he testified, and for that reason there was no error in admitting his testimony.

3. The third point presents a more material and important question, and it challenges the action of the court in refusing to give an instruction asked by the defendant, as follows:

"If you have in your minds a reasonable doubt as to whether defendant's story is true or false—that is, if you are not satisfied that it is false—then his story shows he acted in protecting himself from great bodily harm, or that his position or surroundings were such as to excite in the mind of a reasonable person fear that his life or body was in great

danger, then you should not hesitate to acquit him, and give him the benefit of that doubt."

The foregoing instruction, as we understand it, does not contain a correct statement of the law; and if it did, the matter covered by the question of self-defense was embraced in other instructions given the jury by the court.

After an examination of all the instructions in the case, we think the law was fully and correctly stated on the trial, and, finding no substantial error in the record, the judgment and order are affirmed.

We concur: Myrick, J.; Thornton, J.

COMBS v. HAWES.

No. 8898; November 19, 1885.

8 Pac. 597.

Mortgage—Deed as Security—Foreclosure.—A deed given to secure the payment of money advanced by the grantee is in effect a mortgage, and must be foreclosed in accordance with the statute: Code Civ. Proc., sec. 726.

Mortgage—Lien of Grantee on Paying Prior Mortgages.—Equity will give to the grantee in a deed, construed to be a mortgage, a lien on the land, to the extent of payments of other mortgages on the land, which he has been obliged to make to protect his own security.

Infant—Promissory Note—Disaffirmance.—An infant over the age of eighteen years executing a promissory note, the consideration of which he receives, and which note is paid by an indorser, cannot disaffirm his contract with the indorser without refunding the amount paid in taking up the note.[1]

APPEAL from Superior Court, County of Lake.

Jos. C. Bates for appellants; E. W. Britt for respondent.

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[1] **Cited** with approval in Whyte v. Rosencrantz, 123 Cal. 641, 69 Am. St. Rep. 90, 56 Pac. 439, where, upon the facts in that case, the court said: "Defendant received money, and that or other money is its only equivalent."

McKINSTRY, J.—The action was brought to recover an alleged balance, with interest thereon, averred to have been paid by plaintiff in satisfaction of a certain promissory note made by defendants to the Bank of Lake, which note the plaintiff, as indorser thereon, was compelled to pay. The complaint avers that defendant Caroline "has conveyed to plaintiff, in part satisfaction of the amount paid by him," certain real and personal property "of the value of two thousand five hundred dollars"; but that the defendants have made no other payment, leaving due and unpaid the sum of two thousand nine hundred and seventy-five dollars, with interest. The answer of the defendant Caroline Hawes denies that the property was conveyed and transferred by her in part payment, but averred the same was conveyed and transferred in full satisfaction of the claim of the plaintiff; and the answer of the defendant Horace is to the same effect, with the additional allegation that when the note was executed he was a minor of the age of eighteen years. The court below found:

"(4) That said defendant Caroline Hawes has conveyed to plaintiff, in part satisfaction of the amount paid by him on said note as alleged in said complaint, the real and personal property referred to in said complaint, of the value of two thousand five hundred dollars. And that such property was not taken or accepted by plaintiff as full satisfaction or payment of the demand in his favor against defendants for reimbursement of the sums paid by him as aforesaid on said note, and was not accepted by him as payment of said note.

"(5) That except by conveyance aforesaid of said real and personal property, the said defendants have not, nor has either of them, repaid to plaintiff any part of the sums paid by him on said note."

The testimony of plaintiff is to the effect that the conveyance from the defendant Caroline Hawes was to secure the payment of the money by him advanced in payment of the note of the defendants. The plaintiff recognized the continuation of the whole indebtedness from defendants after the deed was executed. If the testimony of the plaintiff is to be believed, the conveyance was neither in payment of part nor of the whole of such indebtedness. The transaction was a contract of mortgage. Finding No. 4 is therefore

not justified by the evidence. If the facts are as claimed by plaintiff in his testimony, he should have filed his complaint for the foreclosure of his mortgage. There can be but one action in such cases, which must be in accordance with the Code of Civil Procedure, section 726. If, while the legal title stood apparently in plaintiff, he was obliged to protect his security by paying off other mortgages on the land, equity would give him a lien thereon to the extent of such payments.

There was evidence to justify the finding of the court that defendant Horace, with the other defendant, received the benefit of the moneys received from the Bank of Lake. It follows, of course, that he received the benefit of the moneys paid by plaintiff to satisfy the note of defendants. He was eighteen years of age when the note was given. Section 35 of the Civil Code reads: "In all cases other than those specified in sections 36 and 37, the contract of a minor, if made while he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterward; or, in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor while he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration of the party from whom it was received, or paying its equivalent."

The provision of the section which requires the restoration of the consideration to the party from whom it was received as a condition precedent to the disaffirmance of a contract made by an infant over the age of eighteen applies as well to the contract to refund to plaintiff the money advanced by him in taking up the note as to the original contract evidenced by the promissory note.

Judgment and order reversed and cause remanded for further proceedings.

We concur: Ross, J.; McKee, J.

HUNTINGTON v. RUSSELL and Others.

No. 8257; November 20, 1885.

8 Pac. 511.

Contract to Carry on Business—Construction.—The agreement mentioned in the opinion construed, and held, that the defendant was not bound to carry on the business therein provided for for any particular time.

APPEAL from Superior Court, County of San Luis Obispo.

The intestate and defendant Russell were engaged in a partnership business. Said defendant purchased his partner's interest in the business for a specified price, and agreed to pay a further sum if, in the opinion of certain parties (the other defendants), the profits of the business justified him in so doing, the matter to be decided within three years. Defendant Russell soon after sold out the business, and the parties agreed on (the other defendants) decided that the profits did not justify such further payment. Plaintiff alleged such sale and decision to be a fraudulent conspiracy between the defendants.

William Leviston and J. M. Wilcoxon for appellant; William J. Graves and Ernest Graves for respondents.

MYRICK, J.—There is nothing in the agreement made between Huntington and Russell by which Russell was bound to continue the business for any particular time; it was, in effect, that if he should carry it on with certain results, he would pay Huntington a certain sum. There is no fact stated in the complaint which shows that at the time Russell sold out the business it was sold for less than its then value, or that at that time it did not appear advisable to him and his codefendants to sell. The demurrer was properly sustained.

Judgment affirmed.

We concur: Thornton, J.; Morrison, C. J.

ADAIR v. CRANE and Others.

No. 9977; November 20, 1885.

8 Pac. 512.

Boundaries.—Adjoining Proprietors may Orally Agree That the Division line between their lands shall be a certain fence.

Appeal.—The Admission of Immaterial Evidence, if It Work No Injury to the party complaining thereof, is error without injury, and not ground for a reversal.

APPEAL from Superior Court, County of Ventura.

Ejectment. Defendants set up an equitable title to lands on one side of a certain wire fence in accordance with an oral agreement establishing such fence as the division line between defendants' and plaintiff's land. On the trial the court refused to strike out the testimony of the witness Criss, who had been permitted to testify, against plaintiff's objection, regarding the understanding in the community as to the division line.

L. C. McKieby and Williams & Williams for appellant; Blackstock & Shepherd for respondents.

By the COURT.—1. There is evidence to sustain the finding as to the agreement of the parties that the wire fence should be the division line. It was competent for the parties to make such an agreement.

2. It is not manifest that any injury occurred from the refusal to strike out the testimony of the witness Criss.

We see no error in the transcript. Judgment and order affirmed.

GARIDO v. AMERICAN CENT. INS. CO. OF ST. LOUIS.

No. 8624; November 20, 1885.

3 Pac. 512.

Fire Insurance—Time for Suing on Policy.—Where an insurance policy contains a clause that any suit or action thereon should be commenced within twelve months after the loss, the action thereon must be brought within the time limited, and held, that the evidence in the present action did not sustain a finding that the delay in bringing the suit was caused by defendant's conduct.[1]

APPEAL from Superior Court, County of Contra Costa.

Sidney V. Smith & Son for appellant; Mills & Jones and Warmcastle & Bowie for respondent.

MYRICK, J.—Action on an insurance policy. The property insured was destroyed February 15, 1880. The assured gave immediate notice of the loss, and as soon thereafter as practicable made proofs, as required by the policy. The complaint was filed November 1, 1881. The policy contained the clause that any suit or action thereon should be commenced within twelve months next after the loss. The action not having been commenced until nearly two years after the fire, the plaintiff endeavored to prove, and claims, and the court below found, that in and about negotiations for a compromise the conduct of the defendant was such that it impliedly agreed to suspend the clause above referred to, and that the defendant held out hopes that an adjustment would be made, and induced the plaintiff and the assured to delay bringing the suit within one year after the loss.

Admitting that the agent, Snow, had full authority, we do not think there is evidence upon which to base the above

[1] Cited in Case v. Sun Ins. Co., 83 Cal. 477, 8 L. R. A. 48, 23 Pac. 535, and distinguished from a case where it was impossible to bring the action within the twelve months.

Cited in Fitzpatrick v. North American Acc. Ins. Co., 18 Cal. App. 266, 123 Pac. 210, as authority for sustaining a demurrer to the complaint in a suit begun after the time expressly limited in the policy.

findings. On the contrary, we think the plaintiff acted entirely upon his own judgment, and that of his attorney. Whatever may have been the effect of the negotiations prior to January 21, 1881, on that day plaintiff was distinctly informed of the position of the defendant. This was in ample time to commence the suit. Judgment and order reversed and cause remanded for a new trial.

We concur: Thornton, J.; Morrison, C. J.

DAVIS v. McGREW and Another.

No. 9126; November 23, 1885.

8 Pac. 618.

Landlord and Tenant—Conspiracy in Obtaining Lease—Cancellation.—Where a complaint averred that defendants had conspired to cheat and defraud the plaintiff by inducing him to lease to one of them certain lands, and that they had carried out such conspiracy by fraudulent representations to plaintiff to his injury, and that he had suffered damage thereby, the complaint was held to state a good cause of action entitling him to a cancellation of the lease.[1]

APPEAL from Superior Court, County of Contra Costa.

A. H. Griffith for appellant; A. A. Moore, George W. Reed and E. J. Emmons for respondents.

MORRISON, C. J.—The foundation of this action is an alleged conspiracy between the defendants to cheat and defraud the plaintiff. In support of this action he states numerous facts and circumstances tending to establish such conspiracy, and a final consummation thereof by the defendants. The plaintiff avers he was in possession exclusively of a tract of land forming part of the San Pablo rancho; that he was cultivating the same, and raising a crop thereon of

[1] Cited in Davis v. McGrew, 82 Cal. 136, 23 Pac. 41, as a former appeal of the case under consideration. At the second trial the court held there was no misrepresentation, and rendered judgment for the defendant. Affirmed.

the value of one thousand dollars; that a conspiracy was formed by the defendants to obtain from him (the plaintiff) the tract of land so held and cultivated by him, and by reason of artful devices and deceitful practices on the part of the defendants, acting in concert, and which are set forth in the complaint, the plaintiff was prevailed upon and induced to accept a lease of the land so held and cultivated by him, from the defendant McGrew; that he did attorn to said McGrew, and in the lease agreed to pay McGrew a certain rental for said land; that McGrew had no title to the land, but made it appear to the plaintiff that by accepting a lease therefor he would be secured in his rights and avoid further trouble and perhaps ultimate loss.

The defendant Gift acted as the pretended friend of the plaintiff, and in the disguise of a pacific mediator between the parties, making various statements respecting the rights and prospects of the other defendant in the case, and fraudulently deceiving the plaintiff, and inducing him to believe his interests would be subserved by the acceptance of a lease from and by attorning to the defendant McGrew; that plaintiff is an ignorant foreigner, and relying upon such representations, and fully believing that the defendant Gift was acting as his friend in the matter, and that it was to his (plaintiff's) interest to accede to the terms proposed, he did accept a lease from and attorn to the defendant McGrew.

The complaint goes into such detail in stating the alleged fraudulent acts of the parties defendant, from which it appears that there was a fraudulent conspiracy to cheat and defraud the plaintiff, which culminated in the acceptance by him of a lease from McGrew, who had no title or color of title to the land in question, and the promises of plaintiff to pay him rent therefor. To this complaint defendants demurred, and the court sustained the demurrer. Final judgment was entered up thereupon, and plaintiff takes this appeal.

We can hardly understand upon what ground the court below acted in sustaining the demurrer to the complaint. It is plainly charged, with particularity of detail, that the defendants formed a conspiracy to cheat and defraud the plaintiff; that they carried out such conspiracy by false and fraudulent representations, which imposed upon the plaintiff; and

that plaintiff has been damaged thereby. He now asks that the lease so fraudulently obtained from him may be brought into court, and declared null and void; and, further, that he may have damages for the fraud practiced upon him. In our judgment the complaint sets forth a good cause of action against the defendants, and one which entitles him to relief in a court of equity.

It is claimed on the part of the defendants that this case comes within the rule laid down in Hawkins v. Hawkins, 50 Cal. 558. In our opinion the rule laid down in that case does not apply to this, as here the circumstances are different. In the complaint some matter occurs which the learned judge below regarded as disrespectful to himself, and therefore struck the same out. The objectionable matter was a part of the plaintiff's case, and was not disrespectful. It should, therefore, have been allowed to remain in the complaint. Judgment and order reversed.

We concur: Myrick, J.; Thornton, J.

PEOPLE v. JONES.

No. 20,095; November 24, 1885.

8 Pac. 611.

Embezzlement.—Verdict Held Sustained by the evidence.

New Trial—Newly Discovered Evidence.—Where a Motion is Made for a new trial on the ground of newly discovered evidence, if it was in the power of the person so moving to have produced the evidence on the first trial, the motion is properly denied.

APPEAL from Superior Court, City and County of San Francisco.

John D. Whaley for appellant; Attorney General for respondent.

FOOTE, C.—The defendant was convicted of the crime of embezzlement, upon information under section 508 of the

Penal Code. A motion for a new trial was made in his behalf and denied. From the order made therein and the judgment of conviction he appealed. The grounds of this appeal are that the verdict of the jury was contrary to the evidence, and that the court should have granted a new trial for that reason and that of newly discovered evidence. The preponderance of the evidence certainly went to prove the guilt of the defendant as charged, and the verdict against him should not be disturbed: People v. Ah Loy, 10 Cal. 301; People v. Gill, 45 Cal. 285; People v. Simpson, 50 Cal. 304.

It appears that it was within the defendant's power to have introduced on his trial the most of that which he terms newly discovered evidence. And the material parts of it are flatly contradicted by a counter-affidavit of Mr. Fenner.

There is no error in the record and the judgment and order should be affirmed.

We concur: Belcher, C. C.; Searls, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

OLIVER, Administrator, etc., v. BLAIR and Others.

No. 8809; November 25, 1885.

8 Pac. 612.

Equity—Relief Granted Under Prayer for General Relief.—In courts of equity, if the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under a prayer for general relief; but under such prayer no relief can be granted beyond that which is authorized by the facts stated in the bill.

APPEAL from Superior Court, City and County of San Francisco.

W. S. Goodfellow for appellant; W. M. Pierson, A. Compte, Jr., and Joseph Naphtaly for respondent.

FOOTE, C.—A rehearing was granted to Henry Coubrough, one of the defendants herein. An examination of the record, petition for rehearing, and authorities, convinces us that the opinion delivered by Department 2 of this court, on the thirtieth day of April, 1885, was in all respects correct: Oliver v. Blair, ante, p. 472, 6 Pac. 847.

The complaint upon which default was taken against Coubrough stated facts amply sufficient to support the judgment. After asking for certain specific relief, the prayer of that pleading concludes as follows: "And for such other or further and different relief in the premises as shall be just and equitable, and for the costs of this action."

The action was equitable in its nature. In Carpentier v. Brenham, 50 Cal. 552, it is said: "In courts of equity the rule is universal that under the prayer for general relief no relief can be granted beyond that which is authorized by the facts stated in the bill; and to the same effect is our statute"; meaning thereby section 147 of the Practice Act, which was in force when the action was tried, the language of which is identical with that of section 580 of the Code of Civil Procedure. In Rollins v. Forbes, 10 Cal. 300, where a default was taken, this authoritative declaration was made: "If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief; and even in the absence of such clause, where an answer is filed: Practice Act, sec. 147."

The judgment should be affirmed.

We concur: Searls, C.; Belcher, C. C.

By the COURT.—For the reasons given in the foregoing opinion the judgment is affirmed.

BOWMAN v. DEWEY.

No. 8480; November 25, 1885.

8 Pac. 613.

Taxation—Assessment Under Act of March 18, 1874, Invalid.—A tax founded on a special and supplemental assessment, made in the year 1880–81 by the assessor in the city and county of San Francisco, of certain personal property, did not become a lien on the property of the person assessed, as such assessment was invalid.

APPEAL from Superior Court, City and County of San Francisco.

Cope & Boyd for appellant; Doyle, Barber, Galpin & Scripture for respondent.

BELCHER, C. C.—This is an action to enforce the specific performance of a contract for the sale of a lot in the city of San Francisco, and to require the defendant to pay certain taxes which, it is alleged, are a lien on the lot. The contract provided that the title to the lot should be "good and marketable, and free of all encumbrances." The complaint alleges that in the fiscal year 1880–81 the assessor of the city and county of San Francisco made a special and supplemental assessment of certain personal property owned by the defendant, under the provisions of the act of March 18, 1874 (Stats. 1873–74, p. 477), and that the taxes so levied have not been paid, and are a lien and encumbrance on the lot. The defendant demurred to the complaint and at the same time answered thereto. By his answer he denied that the said taxes ever became or were a lien on the lot, and he alleged, among other things, that the said special or supplemental assessment was invalid because it was made after the fourth Monday of July, 1880, and after the board of equalization had adjourned, and without any order or direction of the board of supervisors, or the board of equalization. The plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defense or counterclaim to the cause of action set forth in the complaint. The court sustained the demurrer to the complaint,

and overruled the demurrer to the answer; and, the plaintiff declining to amend, judgment was entered in favor of the defendant. The appeal is from that judgment.

It is apparent that the only question presented for decision is, Was the tax founded on the assessment in question a lien upon the lot of land described in the complaint? A similar assessment was involved in the case of People v. Pittsburg R. Co., 67 Cal. 625, 8 Pac. 381, and was held by this court to be invalid.

Upon the authority of that case the judgment here should be affirmed.

We concur: Searls, C.; Foote, C.

By the COURT.—For the reasons stated in the foregoing opinion the judgment is affirmed.

We dissent: Myrick, J.; Thornton, J.

BRYANT v. BANK OF CALIFORNIA.

No. 7701; November 25, 1885.

8 Pac. 644.

Supplementary Proceedings — Law Authorizing Unconstitutional.—The law purporting to authorize a judge, by order, to permit the judgment creditor to institute and maintain an action against the debtor of the judgment debtor (viz., Code of Civil Procedure, section 720), is unconstitutional and void, as no notice of such proceeding to the judgment debtor is provided for.[1]

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[1] **Cited** and disapproved in High v. Bank of Commerce, 95 Cal. 387, 29 Am. St. Rep. 121, 30 Pac. 556, where it is held that the jurisdiction acquired in the action in which judgment is recovered survives until the satisfaction of the judgment.

Cited in Ackerman v. Green, 201 Mo. 244, 100 S. W. 34, where it is approved so far as a third party is concerned, one upon whom service had not been made in the original action.

Cited in Ackerman v. Green, 201 Mo. 241, 100 S. W. 33, where the rule is held not to apply to the case of an order upon the judgment debtor to disclose the hiding place of property, known to exist, which is susceptible of being levied upon.

APPEAL from Superior Court, City and County of San Francisco.

Wilson & Wilson for appellant; L. E. Bulkeley for respondent.

MYRICK, J.—The plaintiff herein, Bryant, had judgment against one Quimbie; and such proceedings were had, under sections 714–720, Code of Civil Procedure, that the judge of the court in which the judgment had been rendered signed an order authorizing the plaintiff to institute an action against the defendant herein, as a debtor to Quimbie. That order was not filed by the clerk of the court, nor any entry made. On the trial of this case in the court below, the order, as well as all the proceedings subsequent to the execution, were produced by the attorney for the plaintiff from his own custody. In pursuance of such order, this action was commenced. Inasmuch as no notice to the judgment debtor of the proceeding authorized by section 720 of the Code of Civil Procedure is provided for, we are of opinion that that section, which purports to authorize the judge, by order, to permit the judgment creditor to institute and maintain an action against the alleged debtor of the judgment debtor, is unconstitutional and void. This, not only for the protection of the rights of the judgment debtor, but also for the protection of those of his alleged debtor, who might otherwise be compelled to pay twice.

A cogent argument in favor of the correctness of this view is the following, which we present by way of illustration: A case is now in this court on appeal, in which case one Bulkeley, an assignee of Quimbie, sued the Bank of California (the defendant herein) to recover of it a sum of money, a portion of which sum is the identical money in controversy in this action; Bulkeley asserting his right to have judgment for the whole. If Bulkeley be entitled to recover, as assignee of Quimbie, and if the plaintiff here could recover, the result would be the defendant would have to pay the amount of plaintiff's demand twice. Judgment and order reversed and cause remanded.

I concur: Ross, J.

McKEE, J., Concurring.—For the reasons given in my opinion heretofore filed in this case (Bryant v. Bank of California, ante, p. 475, 7 Pac. 128) I concur in the judgment.

MORRISON, C. J., Concurring.—I concur in the judgment on the ground stated by McKee, J.

PEOPLE v. LEE.

No. 20,098; November 25, 1885.

8 Pac. 685.

Criminal Trial—Continuance for Absence of Witnesses.—It is error, in a criminal trial, to refuse the defendant a continuance, asked for on the ground of absence of witnesses from the county, where, from the uncontradicted affidavit of the defendant, it appears that such witnesses were regularly subpoenaed; that the facts which defendant expected to prove by them, and which are stated in the affidavit, are material to the defense; that he could not prove the same facts by any other witnesses; and that he expected to be able to procure their attendance, if the trial was postponed.[1]

Criminal Trial—Self-defense.—To Establish Plea of Self-defense, and entitle defendant to acquittal, it is not necessary that the fact of danger to life and limb should be shown by the evidence beyond a reasonable doubt, and to charge the jury that such proof is necessary is error.

Criminal Trial—Evidence of Character of Defendant.—In a criminal case the jury must take evidence of character into consideration for the purpose of determining whether it creates a reasonable doubt of guilt, and the consideration of such evidence by the jury is not confined to cases where the guilt of the accused is doubtful.

APPEAL from Superior Court, County of Mono.

W. O. Parker, W. H. Viaden and Paul W. Bennett for appellant; Attorney General for respondent.

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[1] Cited with approval in State v. Rooke, 10 Idaho, 399, 79 Pac. 85, but held to have no force as authority for granting a continuance where the party applying can give no assurance that the absent witness can be produced at a future day.

MORRISON, C. J.—The defendant was convicted in the superior court of the county of Mono on an information charging him with an assault with intent to commit murder, and from the judgment of conviction, as well as from the order denying his motion for a new trial, he appeals to this court. It will not be necessary for us to examine all the alleged errors imputed to the court below, particularly those in connection with seventy instructions in the case, as the judgment will have to be reversed upon the first point made on the appeal. When the case was called for trial in the court below defendant interposed a motion for a continuance, which was denied. The basis of the application was the nonappearance of two witnesses in behalf of the defense. These witnesses, named Hayes and Hill, were absent from the county of Mono, and were, respectively, in the counties of Mariposa and Calaveras. The defendant, in order to have them subpoenaed according to the statute in such cases provided, made the affidavit and procured the order named in section 1330 of the Penal Code, and in pursuance thereof the witnesses were duly and regularly subpoenaed in the counties where found. Notwithstanding this fact they failed to appear at the trial, and, in consequence of their nonappearance, defendant moved the court for a continuance of the cause, which motion was denied. The motion was accompanied by an affidavit showing due service of a subpoena; what facts the defendant expected to prove by the absent witnesses; that the facts (stating them) were material to the defense; that he could not prove the same facts by any other witnesses; and that he expected to be able to procure their attendance, if the trial was postponed to some future day. The sufficiency of the affidavit was not questioned by the attorney for the people, but the motion was denied for the reasons stated in the following order: "The court then and there denies the defendant's motion for a continuance of the trial of said cause, giving as a reason for denying the same that the court is the guardian of the interests of the county; that a jury is already in attendance, and the court cannot put the county to the expense of calling another jury; and that it may appear during the course of the trial that other witnesses could testify to the same facts as mentioned in

defendant's affidavit for continuance; and the affidavit shows that the evidence would be cumulative."

The only proper reason given by the court for denying the defendant's motion for a continuance is that the affidavit shows that the evidence would be cumulative. We fail to find any such thing in the affidavit. On the contrary, the affidavit states "that the said facts, which affiant can prove by Hayes and Hill (the absent witnesses), cannot be proved by any other person or persons." By section 1052 of the Penal Code it is provided that "when an action is called for trial or at any time previous thereto, the court may, upon sufficient cause, direct the trial to be postponed to another day." Under the provisions of the law as well as under article 1, section 13, of the constitution, the defendant was entitled to the personal attendance of his witnesses at the trial, and on a proper showing (which was made in this case) to a continuance, and it was error to deny such motion. It was so held by the court in the case of People v. McCrory, 41 Cal. 458. The court there says: "There was a sufficient showing as to the materiality of the absent witnesses, and there was apparently no lack of diligence in the effort to procure their attendance. The attorney general has failed to point out any particular wherein the affidavit was defective, and I discover none. I think the showing was sufficient, and the motion should have been granted, particularly as this was the first motion for a continuance."

All that was said by the learned justice (Crockett) in the foregoing case applies with full force to the case we are now considering.

There are other errors assigned which it is unnecessary for the court to pass upon, excepting some in relation to the instructions. As we have already remarked, about seventeen instructions were moved by the prosecution and fifty-eight by the defense. It is reasonable to suppose that these instructions embodied all the law it was necessary to give the jury, but after passing on these instructions, and giving a large number of them to the jury, the court proceeded of its own motion further to charge the jury, and in such charge fell into at least two errors, which will be noticed. The court said: "You will apply the evidence in this case to the law of justifiable homicide I have read to you, and if you believe

from the evidence, beyond a reasonable doubt, that defendant, at the time he fired the shot, was in imminent danger of losing his life or of having inflicted upon him a great bodily injury," etc.

It was not necessary that the fact of danger to life or limb should be shown by the evidence beyond a reasonable doubt, to entitle him to an acquittal, and we cannot say that the defendant was not prejudiced by such an erroneous instruction at the end of the charge to the jury. Another error occurs in the closing part of the charge, which is equally serious and erroneous. Charging the jury on the question of good character, the court said: "Evidence of character can only be considered in relation to the particular crime charged in cases where the guilt of the accused is doubtful."

This is contrary to the rule laid down by the supreme court in numerous cases. It will be sufficient to refer to two or three of these cases: People v. Ashe, 44 Cal. 288; People v. Bell, 49 Cal. 485. In the latter case the court says: "The jury must take such evidence [of character] into consideration for the purpose of determining whether it creates a reasonable doubt of his guilt."

It is not improper for us to call the attention of the court below, as well as other superior judges, to the suggestion of Justice Baldwin in case of People v. Gibson, 17 Cal. 283, on the subject of instructions to the jury in criminal cases.

Judgment and order reversed and cause remanded for a new trial.

I concur: Myrick, J.

I concur in the judgment: Thornton, J.

PEOPLE v. JOHNSON.

No. 20,075; November 26, 1885.

8 Pac. 690.

Criminal Law—Appeal—Instructions, Presumption in Favor of. Where, in a criminal case, none of the evidence given on the trial appears in the record on appeal, the appellate court must presume that the instructions granted by the court at the instance of the prosecution, and its charge to the jury on its own motion, were proper, if such a state of the evidence therein is conceivable as may have rendered them correct.

APPEAL from Superior Court, County of Mendocino.

T. L. Carothers for appellant; Attorney General for respondents.

FOOTE, C.—Appeal from a judgment of conviction of murder in the first degree, and from an order denying a new trial, in the superior court of the county of Mendocino.

There is an absence of all evidence in the transcript before us. We cannot then say that the instructions asked by the defendant, and refused by the court, had any application to the case as made: People v. Herbert, 61 Cal. 545.

The same thing may be said as to the alleged error, that the court, not being requested so to do by the defendant, failed to instruct the jury as to what constituted either justifiable or excusable homicide.

That part of the court's charge in reference to the law of reasonable doubt is not subject to the criticism made on it. The jury were not misled into supposing that they were authorized to become "satisfied" of the defendant's guilt from anything except the evidence in the case. The authorities cited by the defendant do not sustain him in the positions he has assumed.

As has been before stated, none of the evidence given on the trial of this case is before us for examination. We must presume, therefore, that the instructions granted by the court at the instance of the prosecution, and its charge to the jury on its own motion, were proper, since such a state of the

evidence therein is conceivable as may have rendered them correct: People v. Padillia, 42 Cal. 535.

The judgment and order should be affirmed.

We concur: Belcher, C. C.; Searls, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

WHITE v. DOUGLASS.

No. 9612; November 26, 1885.

8 Pac. 801.

University of California—Instructions for Sale of Land.—Instructions to the land agent of the University of California, directing him to receive applications for surveyed land, in accordance with a designated plan, whether they emanate from the board of regents or not, if subsequently recognized and enforced by them, will be held to be the instructions of the board.

APPEAL from Superior Court, County of San Joaquin.

David S. Terry and George A. Nourse for appellant; J. H. Budd and W. L. Dudley for respondent.

SEARLS, C.—This is an action to determine a contest between applicants for the purchase of land from the state of California, as provided for under sections 3414–3416 of the Political Code. The cause was tried by the court, a jury having been waived, and judgment was rendered upon written findings in favor of plaintiff, from which, and from an order denying a new trial, defendant appeals. It is objected to the first finding of the court that the evidence shows without conflict that no purchase of the land described in the complaint, or any portion thereof, was made by plaintiff from Pico, but that an agreement was made to purchase over one thousand acres of land, including the land in controversy, provided the claim of Pico to the Moquelemos grant was confirmed by the supreme court of the United States; that plaintiff was in

possession long before the date of such contract, and had improved the land prior thereto, and that neither his entry nor improvements were made under said contract. The finding of fact, standing by itself, seems liable to the criticism aimed at it, but when taken in connection with other facts, as found by the court, the reason of the objection fails.

The findings, as a whole, embody a history of plaintiff's connection with the land, his acts of control over it, improvements made thereon, contracts for the purchase thereof from Andreas Pico, his failure to obtain title under such contract, the reason of such failure, and his subsequent application to purchase through the regents of the University of the State of California. For convenience, as we suppose, the findings are divided into nineteen sections, and numbered consecutively from 1 to 19, and a part of the subject matter which might with propriety have been included in No. 1 is embodied in No. 5, and the two findings, read together, properly state the facts deducible from the evidence touching the attempted purchase from Pico. The fifth finding is in the following language: "That in fact said purchase of said land by plaintiff from said Pico was a conditional one, and said Pico agreed in and by the agreement of purchase thereof to repay to plaintiff said sum of fifteen hundred and sixty dollars, in case the claim of said Pico to said land, as a part of said Mexican grant called 'Moquelemos,' should not be finally confirmed."

Had this last finding been attached to the first, it would have met the objection aimed at the former. Separated from it, we cannot see that it loses its potency as a fact in the case.

The seventh finding of fact, among other things, finds that the rules and regulations of the board of regents of the university required all applications for land granted by Congress for the use of an agricultural college to accompany such application with an affidavit containing, among other things, a statement that there were no occupations of nor settlements upon the land sought to be purchased other than that of the applicant, and that the affidavit of defendant contained no such statement. It is objected to this finding that it was the land committee of the board of regents, and not the board, who promulgated the regulations in evidence dated April 9, 1871. The instructions purport to emanate from the board

of regents, and are addressed to H. A. Higley, land agent of the university, directing him to receive applications for surveyed land in accordance with previous instructions, but to so change the required affidavit as to read, etc. There is also in evidence a resolution of the board of regents dated June 15, 1871, providing for the additional affidavit required by the regulations of April 9, 1871, in cases of applications made prior to the date of said last-named instructions. These proceedings show that the instructions of April 9, 1871, were recognized, acted upon, and enforced by the board of regents, and whether originally formulated by the board as such, or by a committee, is not important. The essential thing is that they were put forth, published to the world, and acted upon, as the instructions governing their subordinates, and applicants for the purchase of university lands, so called. Defendant's application to purchase was filed February 26, 1874, and was accompanied with the affidavit hereinbefore mentioned, a copy of which is set out in the complaint herein.

According to the eighth finding, "the board of regents of said university never accepted said defendant's said application to purchase, ... and said land was never located in said United States land office, Stockton district, ... for defendant's benefit." The only evidence in the bill of exceptions on the subject is that of A. J. Moulder, land agent of the university, who says: "I cannot remember what I did in reference to the defendant's application, but the presumption is violent that I did in that case what I always did in similar cases, and what it was my duty to do; that is, applied to the register of the land office of the Stockton district, to select that particular tract of land as a portion of the one hundred and fifty thousand acres agricultural grant assigned by the legislature to the university."

If the land was in fact ever entered, or application made therefor, at the Stockton land office, the fact was one which could have been so easily proven, and the records of the land office constituting, as they would, conclusive evidence on the point, in the absence of such proof we are not surprised that the court, upon the uncertain evidence set out, found as above stated.

There was no evidence that the board of regents of the university ever accepted defendant's application to purchase,

or in any way passed upon his application, or did or performed any act or thing in the premises, save and except through their land agent, who received his application to purchase, and two hundred and ninety-six dollars and thirty-three cents as part of the purchase price which it was usual to exact when an application was filed.

This disposes of all the grounds upon which the motion for a new trial was based. The facts as found by the court warrant the judgment entered, and we are of opinion the judgment and order denying a new trial should be affirmed.

We concur: Belcher, C. C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

CRESCENT MILL & TRANSPORTATION CO. v. HAYES and Others.

No. 8948; November 30, 1885.

8 Pac. 692.

Obstruction of Navigable Water—Injunction—Averment of Special Injury.—In an action to enjoin defendants from interfering with the navigability of Lake Earl, which was declared by the legislature to be navigable, the complaint shows special injury to the plaintiff where it avers that plaintiff is the owner and in possession of a mill situated on Lake Earl; that it has been such owner and so possessed of this mill for thirteen years next last past; that plaintiff's business is the manufacture of lumber for sale at this mill; that it is necessary that plaintiff should use said lake in transporting the saw-logs cut from its lands to said mill; and that what defendants threaten to do will destroy the navigation of said lake, so that the logs cannot be transported to said mill.[1]

APPEAL from Superior Court, County of Humboldt.

W. A. Hamilton, J. J. De Haven and J. D. H. Chamberlain for appellants; R. G. Knox and L. F. Cooper for respondents.

[1] Cited in note in 38 L. R. A., N. S., 767, on private right of action for obstruction of navigable stream.

THORNTON, J.—This is an action to enjoin defendants from interfering in the navigability of Lake Earl, which had been by an act of the legislature approved February 4, 1874, declared navigable. The lake is averred to be in fact navigable. It is contended that the contemplated interference would be a public injury; that the complaint does not show any special injury to the plaintiff, and therefore it cannot maintain the action. In this contention we cannot concur.

It is averred in the complaint that the plaintiff is the owner and in possession of a mill situate on Lake Earl; that it has been such owner and so possessed of this mill for thirteen years next last past; that plaintiff's business is the manufacture of lumber for sale at this mill; that it is necessary that plaintiff should use said lake in transporting the saw-logs cut from its lands to said mill; and that what defendants threaten to do will destroy the navigation of said lake, so that the logs cannot be transported to said mill. We think that the above averments show a special injury to the plaintiff. The defenses set up in the answer were demurred to, and the demurrer was sustained. On examination of the answer, we are of opinion that the court committed no error in its ruling. The court finds that all the allegations in the complaint were true. There is no error in the record. Judgment affirmed.

We concur: Morrison, C. J.; Ross, J.; Sharpstein, J.

CROSS v. ZELLERBACH and Another.

No. 9796; November 30, 1885.

8 Pac. 714.

Statute of Limitations—Parol Evidence of Waiver.—In an action on promissory notes, where the bar of the statute of limitations is set up and issue is joined thereon, the plaintiff relying upon a writing signed by the defendant waiving the benefit of the statute of limitations, parol evidence is admissible of the circumstances under which such writing was executed as part of the res gestae.

Findings.—Findings Held Supported by the evidence.

APPEAL from Superior Court, County of Nevada.

R. H. Taylor and J. M. Malling for appellant; Searls, Niles & Searls and H. V. Reardan for respondents.

THORNTON, J.—This cause has been before this court twice on appeal, and the judgment on the first appeal will be found reported in 55 Cal., at page 433 et seq. (under the title of Sigourney v. Zellerbach), and on the second appeal in 63 Cal., at page 635 [under the title of Cross v. Zellerbach]. On the appeal last referred to the case bears the same title as the one before us; Sigourney having since the commencement of the action departed this life, and Cross having been afterward appointed his administrator and been substituted in place of Sigourney.

The action was originally brought to foreclose a mortgage executed to the plaintiff Sigourney by a corporation called the Eureka Lake Company. The parties to the cause were the present plaintiff's intestate, the defendants Eureka Lake & Yuba Canal Company, and Zellerbach. It was heard on the pleadings and findings and decree of the court below: See statement, 63 Cal. 636. The judgment in that case was reversed for reasons stated in the opinion above referred to. On the return of the cause to the court a quo, the plaintiff filed in that court a supplemental complaint, which was answered by Zellerbach and the Eureka Lake & Yuba Canal Company. This company filed also a cross-complaint, to which a demurrer was interposed by Zellerbach. This demurrer was sustained, and from the judgment in the case, which was in favor of the plaintiff and against the company, an appeal was prosecuted by the defendant company, on which appeal the main question presented was the ruling of the court a quo on this demurrer. On this appeal the ruling of the court upon this demurrer was held erroneous and the judgment reversed. The facts before the court for consideration on this last appeal are also before us on the present one. We refer to the facts on which the case of the plaintiff and the defendant corporation rests. In the opinion filed in this last appeal in 63 Cal. this court, after fully stating the facts, remarked: "If the facts be as stated, we see no reason why a decree should not be entered substantially as prayed

for in both the supplemental and cross-complaints, to the effect that the plaintiff retain and hold the money so paid in full satisfaction of his demand in the action, and that he be adjudged to satisfy of record and to cancel and deliver up the note and mortgage described in the original complaint, and to cancel and deliver up to Zellerbach the forty thousand dollar and ten thousand dollar notes executed by him, and that the twelve thousand dollar note executed to Sigourney by the Eureka Lake Water Company, together with the mortgage executed by that company to Sigourney and Mercellus, be decreed to be fully satisfied": 63 Cal. 642.

It would needlessly prolong this opinion to state the facts of the case on which plaintiff and the defendant company claim the favorable judgment of this court. They are fully stated on pages 637 to 642 in 63 California Reports, and reference is made to that statement. The facts alleged in the cross-complaint, which were assumed to be true in the judgment in 63 Cal., are found now to be true in the case under consideration. We will only state here, as to the twelve hundred and fifty shares of stock mentioned in the passage quoted above from the opinion of the court in 63 Cal., that these shares were deposited with Parrott by Zellerbach as collateral security for a note of forty thousand dollars executed by Zellerbach to Sigourney under an agreement between them executed on the 23d of August, 1865, and which were sold under the judgment of the district court, which was reversed, as reported in 55 Cal. On the reversal of the judgment as stated above, the cause was remanded, with directions to the court below to overrule the demurrer to the cross-complaint, and for proceedings not inconsistent with the opinion on such reversal. The cause was sent back to the court a quo, who heard the same, and found on the testimony and the admissions in the pleadings the facts above referred to to be true; and, finding them to be true, entered a judgment as indicated by the opinion above referred to. The findings of the court were adverse to certain defenses set up by Zellerbach and held not to be in the way of the judgment which was rendered.

Some of the findings are attacked as not being sustained by the evidence. We have examined the testimony in the cause, and find that they are, as to everything material, sustained.

In relation to the fourth finding, that twelve hundred and fifty shares of stock deposited with Parrott by Zellerbach were accepted by Sigourney as security for the payment of the notes of ten thousand dollars and forty thousand dollars, executed by Zellerbach to Sigourney, we are of the opinion that, under the facts developed in the case, the acceptance of the money for which this stock was sold by Sigourney in discharge of the notes above mentioned was a sufficient acceptance to sustain the finding. The equity of the defendant corporation to have such payment to Sigourney held a discharge of those notes is perfect. This we infer to have been the opinion of the court in Cross v. Zellerbach, 63 Cal. 641. The court, referring to these shares, then said:

"These shares were to be held as collateral security for the payment of the forty thousand dollar note executed to Zellerbach by Sigourney. The additional amount of one sixty-fourth part of the capital stock of the same corporation, which the contract required Zellerbach to deposit as collateral security for the payment of a ten thousand dollar note executed by him to Sigourney, he did not deposit; but the cross-complaint alleges that the twelve hundred and fifty shares so deposited were, by both Sigourney and Zellerbach, 'taken and treated as a compliance with the contract, and the stock was managed, controlled, and voted by the said Sigourney, or by his authority, and remained in the hands of John Parrott as trustee under said contract' until taken and sold by the sheriff. Whether, under such a state of facts, a lien attached to the twelve hundred and fifty shares of stock for the payment of the forty thousand dollar and ten thousand dollar notes executed by Zellerbach, or either of them, we find it unnecessary to determine; for when the stock was sold under and by virtue of the decree of the district court, which was subsequently reversed by this court, the cross-complainant purchased it, at the instance and at the request of Zellerbach, and under a definite and specific contract with him, for a sum largely in excess of its market value, and sufficient to discharge what Zellerbach had bound himself to discharge, to wit, the liens on the property held by Sigourney. The money thus paid and bid for the twelve hundred and fifty shares of the stock of the Eureka Lake & Yuba Canal Company, consolidated, less costs and

the expenses of sale, was paid over to Sigourney, and, according to the averments of the supplemental and cross-complaints, was sufficient in amount to satisfy the entire demand of the plaintiff."

The court then proceeds to say, if the facts be as stated, it sees no reason why a decree should not be entered substantially as prayed for in both the supplemental and cross-complaints, etc. (See these latter remarks quoted in full above.)

It is a noticeable fact that on the former trial the judgment of the court below, as regards plaintiff, was substantially the same as in this case; and, as we construe the opinion, the court discovered no error in that part of the judgment appealed from. The error for which it was reversed was that in relation to the company defendant. This view sustains the decree in favor of plaintiff rendered herein.

Several errors of law are assigned as having occurred at the trial, to which exceptions were reserved. We find no error in any of them. The evidence of Hupp was clearly admissible as to the intent with which Zellerbach appended his signature and the words and figures "Nevada City, May 2, 1878," to a writing waiving the benefit of the statute of limitations as to the forty thousand dollar and ten thousand dollar notes above mentioned. Hupp, in his testimony, details the circumstances under which the signature and the words and figures were written by Zellerbach. These facts were pertinent on the issue of the bar of the statute of limitations as to the aforesaid notes, and were parts of the transaction or res gestae. The court committed no error in allowing this testimony.

We find no error in the record and the judgment and order must be affirmed. Ordered accordingly.

We concur: Morrison, C. J.; Myrick, J.

MARKS v. BODIE BANK.

No. 8703; November 30, 1885.

8 Pac. 807.

Bank for Collection—Liability to Account.—Where a bank for collection, having a claim against a certain party, took certain of his notes from another party under an agreement to collect them, and, when collected, pay the proceeds thereof over to plaintiff, deducting costs and expenses of collection, and in pursuance of the agreement did so collect a portion of the notes by means of an action, judgment, and execution sale, if the proceeds were not sufficient to satisfy the demand of plaintiff, the owner of the notes, after payment of the bank's own debt and costs and expenses, neither the plaintiff nor the bank is entitled to payment in full out of the proceeds of the sale, but each is entitled to share in the proportion in which their claims against the debtor had paid the purchase price at the execution sale, and the plaintiff became entitled to his share thereof after sale upon demand.

Evidence—Failure to Object to Incompetency.—A Refusal to Strike Out Evidence on the ground of incompetency and immateriality is not erroneous, if such evidence was admitted without any objection being taken on these grounds.

APPEAL from Superior Court, County of Mono.

F. V. Drake, Marcus Rosenthal and Kittrell & Owen for appellant; Bennett & Reddy for respondent.

BELCHER, C. C.—This is an action to recover the sum of fifteen hundred and fifty dollars, besides interest thereon, which it is alleged the defendant had collected and now holds for the use of the plaintiff.

From the findings it appears that the plaintiff was the owner of three promissory notes made by one Jonas Cohn, on which there was due for principal the sum of fifteen hundred and fifty dollars, and that on the twelfth day of May, 1880, he assigned the notes to the defendant for collection; "the defendant then and there agreeing with the plaintiff to use its best efforts to collect the same, and, when collected, to pay the proceeds thereof over to the plaintiff, deducting therefrom the necessary costs, commissions, and

expenses incident to such collection"; that the defendant at once commenced an action to recover the amount due for principal and interest on the notes, and the further sum of eight hundred and four dollars and sixty-one cents, which Cohn then owed to defendant; that judgment was obtained for the full amount claimed, on which execution was issued; that under the execution there was sold a large lot of clothing, merchandise, and book accounts, the property of Cohn, which was bid in by the defendant for a sum sufficient to satisfy the execution and pay the costs of sale. The court further found that the defendant did not purchase the goods, merchandise, and book accounts at the sheriff's sale for its own sole benefit, but, there being no bidders who were willing to pay therefor a sum sufficient to satisfy the execution, the defendant bid the same in for the use and benefit of the plaintiff and defendant, in order to prevent a sacrifice of the goods and to secure the demands of both parties; that for want of a purchaser willing to pay a fair price for the goods, or sufficient to satisfy the plaintiff's and defendant's demands in full, only a small portion thereof had been sold by defendant, and that after applying the proceeds of the sales to the costs and expenses of the suit and sale, and the expenses of taking care of and disposing of the goods, a portion of the defendant's demand still remained due and unpaid. It was further found as a conclusion that the defendant had no money in its possession belonging to the plaintiff, and was consequently entitled to have judgment entered in his favor. The appeal is by the plaintiff from the judgment and an order denying his motion for a new trial.

1. It was claimed for the plaintiff at the trial, and is claimed here, that the defendant had no authority to bid in the goods on his account or for his benefit, and that, having bid them in in its own name for a sum sufficient to satisfy the execution, it at once became liable to pay him the amount due on his notes for principal and interest. We do not think this claim can be maintained. The notes were turned over to the defendant for collection, and it became its duty to exercise care and diligence in trying to make the full amount of money due on them. The plaintiff estimated the value of the goods seized at considerably more than enough to satisfy the execution. When they were offered for sale, therefore,

there being no other bidders willing to take them at a price which would satisfy the execution, it appeared to be for the interest of both parties that they be bid in on their joint account, and held till they could be sold so as to make the full amount of money to which each was entitled. Looking at all the testimony, and the circumstances surrounding the transaction, we think it may fairly be concluded that the defendant was authorized to bid in the goods for the use and benefit of both parties, and that the court rightly found that it did so bid them in.

It is further claimed for the plaintiff that the court erred in refusing to strike out the testimony of the witness William Irwin, on the ground that it was incompetent and immaterial. The testimony was given without objection on this ground, and the motion to strike out came too late: People v. Long, 43 Cal. 444; People v. Rolfe, 61 Cal. 540.

2. It was claimed by the defendant in its answer that, under the agreement made between the parties, whenever any money should be collected by any means in consequence of the action, it was to be applied—First, to the payment of the costs and expenses incurred in the action, including the attorney's fee; second, to the payment of Cohn's indebtedness to the defendant; and, third, if there should be any overplus, to the payment of the amount due on the notes of the plaintiff. There was nothing in the evidence to justify this claim. No such agreement was proved, and none could be inferred from the circumstances attending the transaction. On the contrary, we must presume that when the property was bid in for the use and benefit of both plaintiff and defendant, they became interested in it, and were entitled to share in its proceeds in the proportions in which their claims against Cohn had paid its purchase price. The title to the whole property was taken in the name of the defendant, but to the extent of plaintiff's interest it was held in trust for him. It follows that when any of the goods were sold, the plaintiff was entitled to demand and receive from the defendant his pro rata share, after paying costs and expenses, of the moneys for which they were sold. The case shows that when this action was commenced, some of the goods had been sold, and the proceeds of the sale were in possession of the defendant. The plaintiff's share of the proceeds should have

been paid to him on his demand, and may be recovered in this action.

The judgment and order should therefore be reversed and the cause remanded for a new trial.

We concur: Searls, C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded for a new trial.

TOOMEY v. REILLY.

No. 9000; December 9, 1885.

8 Pac. 833.

Appeal.—Findings Held Sustained by the evidence.

APPEAL from Superior Court, City and County of San Francisco.

Action on a promissory note for seven hundred dollars. After trial the jury found that "plaintiff paid to defendant, and defendant received of plaintiff, a valuable consideration for said promissory note." The evidence on which this finding was based consisted of testimony that said seven hundred dollar note, and another three hundred dollar note given at the same time, were executed to plaintiff in consideration of the sum of three hundred dollars loaned to defendant by plaintiff, and the interest on said sum, and also as payment for certain services rendered by plaintiff to defendant.

Clement, Osment & Clement for appellant; W. C. Burnett and Isaac G. Burnett for respondent.

By the COURT.—We have examined the evidence given on the trial of this case, and find it sufficient to sustain the findings as to the consideration of the note.

The judgment and order are affirmed.

PETERSON v. DOE and Others.

No. 9090; December 12, 1885.

8 Pac. 834.

Appeal.—Findings Held Supported by the evidence.

Appeal.—Where There is a Substantial Conflict in the Evidence, the court will not, on appeal, disturb the findings, but will affirm the judgment.

APPEAL from Superior Court, City and County of San Francisco.

Pillsbury & Titus for appellant; D. T. Sullivan for respondent.

MORRISON, C. J.—This action was brought for the recovery of one thousand and forty dollars and ten cents for the wrongful conversion by defendants of certain railroad ties, the property of the plaintiff. The case was tried by the court without the intervention of a jury, and the following are the findings of fact and the conclusions of law upon which judgment was rendered for the plaintiff:

"(1) That the defendants, L. B. Doe, George H. Kimball and Charles W. Mott, were, at all the times mentioned in the complaint, and still are, copartners, doing business in the city and county of San Francisco, state of California, under the firm name and style of Doe, Kimball & Co.; (2) that on the fourth day of July, 1882, at the said city and county of San Francisco, the plaintiff here was possessed, as of his own property, of said personal property, viz., two thousand and seventy pieces of timber, called railroad ties; (3) that said railroad ties were of the value of eight hundred and ninety and ten-hundredths dollars lawful money of the United States, on said fourth day of July; (4) that while plaintiff was so possessed of said property on said fourth day of July, 1882, the said defendants took, seized, and carried away and converted the same to their own use, without the permission or consent, and against the will, of plaintiff. Wherefore, as conclusions of law from the foregoing findings of facts, the

court finds that the plaintiff is entitled to a judgment against the defendant herein for the sum of eight hundred and ninety dollars and ten cents, together with interest thereon from the first day of January, 1883, at the rate of seven per cent per annum, amounting," etc.

A motion was made for a new trial, which was denied, and this appeal is from the judgment and order.

There is no seriously contested question of law in the case, but the contention is that some of the findings are not supported by the evidence. A careful examination of the transcript in the case fails to support the contention of the appellants. We think there was sufficient evidence to justify the findings, and on such findings the judgment properly passed for plaintiff. It is sufficient to say that, upon the main points in the case, there was a substantial conflict in the evidence, and in such cases it is the well-settled rule that this court will not interfere with the judgment. Judgment and order affirmed.

We concur: Myrick, J.; Thornton, J.

GOLDEN STATE & MINERS' IRON WORKS v. MUIR.

No. 11,021; December 16, 1885.

8 Pac. 836.

Contracts — Consideration—Findings—Evidence—Presumption. Judgment against plaintiff, and findings against sufficiency of consideration of written instrument, held, contrary to the evidence, as the uncontradicted evidence of defendant's witness, instead of overcoming the presumption in favor of the written instrument on which plaintiff based his claim, really showed a sufficient consideration in all respects as foundations for findings in plaintiff's favor.

APPEAL from Superior Court, County of Placer.

Gray & Haven for appellant; R. P. Wright for respondents.

MYRICK, J.—The defendant executed to plaintiff an order in the following words:

"$3,628.66. Michigan Bluffs, March 7, 1883.

"On June 15, 1883, for value received, please pay Golden State & Miners' Iron Works, or order, at the banking-house of Wells, Fargo & Co., San Francisco, Cal., thirty-six hundred and twenty-eight and sixty-six one hundredths dollars.

"[Signed] WILLIAM MUIR.

"To the Weske Consolidated Mining Company, San Francisco, Cal."

The order was presented and not paid, of which defendant had due notice. The first cause of action is on this order. The second cause of action is for goods and machinery sold and delivered by plaintiff to defendant. The defendant executed to plaintiff a mortgage of personal property to secure the payment of the order, and of the amount of the goods and machinery. This action is to foreclose the mortgage.

The answer averred that there had never been any consideration for the instrument above quoted, of March 7, 1883, and denied that the plaintiff sold and delivered to defendant the goods or machinery, or any part thereof; also averred there was no consideration for the mortgage. The findings of the court were that on the 7th of March, 1883, or at any time before that day, defendant was not indebted to plaintiff in any sum; that plaintiff did not sell or deliver the goods or machinery, or any part thereof, mentioned in the complaint, and defendant was not indebted to plaintiff therefor in any sum; and that there was no consideration for the mortgage. Judgment went for defendant.

The appellant urges that the findings are not sufficient as findings of fact, but are conclusions of law merely, and are therefore not sufficient to sustain the judgment. Without determining this question, we are of opinion that the findings, even if sufficient as findings of fact, are contrary to the evidence. The uncontradicted evidence of the witnesses on the part of the defendant, instead of overcoming the presumption of a consideration afforded by the written instrument, showed a sufficient consideration in all respects as foundation for findings in favor of plaintiff as to that instrument, and also tended to show a sale of the goods and machinery.

The judgment and order are reversed and cause remanded for a new trial.

We concur: Ross, J.; Sharpstein, J.; Morrison, C. J.; Thornton, J.

McDOWELL v. LEVY.

No. 20,156; December 18, 1885.

8 Pac. 857.

Judge.—Bias or Prejudice on the Part of a Trial Judge constitutes no legal incapacity to sit on the trial of a cause.[1]

Application for a writ of prohibition.

On the trial in the court below (one of the departments of the superior court of the city and county of San Francisco), in an action of criminal libel against petitioner, he objected to the cause being tried by the judge then sitting, on the ground of bias and prejudice of such judge, and set out in affidavits the facts claimed to constitute such bias, and moved that the cause be postponed or transferred to another department of the same court on that ground. The motion was denied, and the petitioner then made this application.

S. W. & E. B. Holladay for petitioner.

By the COURT.—The application is denied, on the authority of People v. Williams, 24 Cal. 33: See People v. Mahoney, 18 Cal. 185; People v. Shuler, 28 Cal. 494.

[1] **Cited** and approved in Tibbs v. City of Atlanta, 125 Ga. 21, 53 S. E. 812, where, in the trial of a policeman by a board of police commissioners, the objection interposed as to a member of the board was not entertained, in the absence of statute giving it force.

PERRY and Others v. BRAINARD and Others.

No. 9724; December 19, 1885.

8 Pac. 882.

Mechanics' Liens—Time for Filing.—A mechanics' lien is not acquired upon a building by a subcontractor who has furnished materials to be used thereon, by filing his claim prior to the completion of the building: Code Civ. Proc., sec. 1187.[1]

APPEAL from Superior Court, County of Los Angeles.

Thom & Stephens for appellants; Brunson & Wells and J. Brosseau for respondents.

ROSS, J.—Defendant Brainard contracted to construct a certain dwelling-house for defendant Beaudry for a certain sum of money, and the plaintiffs contracted with Brainard to furnish certain material for the house. The court below found that the lien which was sought to be enforced by the action was filed prior to the completion of the building, and was therefore prematurely filed. The statute reads: "Every original contractor, within sixty days after the completion of his contract, and every person save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record," etc.: Code Civ. Proc., sec. 1187.

[1] **Cited** and followed in Roylance v. San Luis Hotel Co., 74 Cal. 276, 20 Pac. 575, where the complaint itself showed a premature filing of the lien.

Cited and approved in Schwartz v. Knight, 74 Cal. 433, 16 Pac. 235, it being said that the only escape from the principle was there having been originally a purpose to build only in part or that the original purpose to finish had been abandoned.

Cited and approved in Kerckoff-Cuzner M. & L. Co. v. Olmstead, 85 Cal. 83, 24 Pac. 648, where it was held that the cessation of labor on the building for thirty days, made under the law as amended equivalent to a completion for such purposes, did not give a materialman a mere option, but was obligatory upon him.

It will be seen that the time prescribed by the statute for the filing of the plaintiffs' claim was "within thirty days after the completion of the building." Under a similar statute the supreme court of Kansas lately held in two cases (Davis v. Bullard, 32 Kan. 234, 4 Pac. 75, and Seaton v. Chamberlain, 32 Kan. 239, 4 Pac. 89) that a claim so filed was premature, and a lien based thereon could not be enforced. The reasoning of that court commends itself to our judgment, and is much the same as was used here in Dingley v. Greene, 54 Cal. 335. "No privity of contract," said the court in Davis v. Bullard, "exists between the owner of the building and the subcontractor, but the subcontractor's rights are based simply and solely upon his contract made with the contractor. The contractor, and not the owner of the building, is the subcontractor's debtor, and the subcontractor has no right to claim that the building has been completed until the contractor under whom he claims has such right. Under the contract between the owner and the contractor, the owner agrees to pay the contractor a certain sum for constructing the building, and this sum is a fund which may be held under the statutes for the payment, so far as it will go, of all the claims of all the various subcontractors, for work and materials furnished by them to the contractor, who is the principal and head of all; and all the parties entitled to payment or contribution out of this fund should be able to reach the fund and get their proportionate shares thereof at the same time or within the same period of time. Besides, one subcontractor ought not to be able to reach this fund and appropriate it to the extent of his claim before another subcontractor could reach it; for if the fund should not be sufficient to pay the claims of all the subcontractors, then each subcontractor should be paid only a proportionate share thereof. Now, the amount of all the claims of all subcontractors can be ascertained only after all the work and materials have been furnished, and after the building has been completed, so far as the contractor is required to complete the same; for the whole of the work may in fact be done by subcontractors only, or the last item of work performed or materials furnished may be performed or furnished by a subcontractor. The building in such a case would be completed by a subcontractor; and the subcontractor completing the build-

ing, or furnishing the last item of work or material therefor, is entitled to his proportionate share of the general fund equally with the subcontractor who furnished the first item of work or material, or any intermediate portion thereof. Of course, when the contractor has furnished, through himself or his subcontractors, all the work and material which he has agreed to furnish, then the building is completed so far as he is concerned, and is also completed so far as all the subcontractors under him are concerned; and the contractor and each of the subcontractors may then file their respective statements for liens, and each will then become entitled to his proportionate share of the fund."

Other provisions of our statute go to show that this is the true construction of section 1187. Section 1190 declares that "no lien provided for in this chapter binds any building, mining claim, improvement, or structure for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than two years from the time the work is completed by any agreement to give credit."

It is obvious that if a subcontractor may file his claim before the completion of the building at all, it may very well happen that the building may not be completed until more than ninety days after the claim is filed; and since section 1190 of the code provides that no lien shall be binding for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same, it follows that under such a construction of section 1187 a suit might be maintained to enforce the lien of a subcontractor before the completion of the original contract. This would not only be to give one subcontractor a preference over another, not allowed by the statute, but might subject the owner to suit, and possibly his property to sale, although strictly conforming to his contract. In further harmony with the conclusion that section 1187 fixes a common starting point for all subcontractors under the same original contractor is section 1195, which provides that "any number of persons claiming liens may join in the

same action, and when separate actions are commenced, the court may consolidate them."

The danger suggested by appellant's counsel to subcontractors in thus holding is not perceived; for the owner who pays to the original contractor with notice that the subcontractor has not been paid, will be liable to the lien of the latter, and it is an easy matter for the subcontractor to acquaint the owner with such fact. It becomes unnecessary to consider any other point made for appellants. Judgment and order affirmed.

We concur: Myrick, J.; McKee, J.; Sharpstein, J.; Thornton, J.

GUARDIAN FIRE & LIFE ASSUR. CO. v. THOMPSON and Others.

No. 9273; December 21, 1885.

9 Pac. 2.

Appeal Dismissed.—Appeal Dismissed on the Ground That the Court had Jurisdiction of another appeal on the merits.

APPEAL from Superior Court, City and County of San Francisco.

Langhorne & Miller for appellants; Chickering & Thomas for respondent.

By the COURT.—After judgment had been rendered in favor of defendants, plaintiff gave notice of its intention to move the court to vacate and set aside the judgment theretofore rendered and to grant a new trial. Subsequently, on notice, the plaintiff moved the court for leave to amend the notice by inserting the word "decision" in place of the word "judgment," on the ground, as stated in affidavits, that the word "judgment" was inadvertently used by a clerk in preparing the notice, the clerk having before him a form containing the word "decision," and by inadvertence wrote the word "judgment" instead thereof. The court granted the leave to amend.

As the case itself is before us on appeal, by the party who gave the notice, from the judgment and order denying the motion for new trial, on which appeal we this day affirm the judgment, it is unnecessary for us to pass on the question of the authority of the court below to amend the notice of motion; because, conceding, for the purposes of this appeal, the court had authority, on the other appeal we hold the courts committed no error in the case. The question, therefore, remains but a moot question of no practical importance to either party and we dismiss the appeal.

BLISS v. CARROLL.

No. 8732; December 23, 1885.

9 Pac. 88.

Bonded Warehouse Receipts — Storage of Liquors. — Where brandy manufactured for the owner by a licensed distiller is stored in a United States bonded warehouse, regulated by the act of Congress of March 3, 1877, and the treasury regulations of May 15, 1877, in order to delay the payment of the revenue tax, such laws requiring brandy to be stored in a distiller's name, but not requiring the distiller to be the owner, if the warehouse receipt was issued to the distiller, and he subsequently sold the liquor to another, without authority, and transferred the receipt to him, the purchaser was a bona fide purchaser for value and without notice, and the owner of the liquor was entitled to a return of his property on paying to such purchaser his payments for warehouse charges and the government tax.

APPEAL from Superior Court, City and County of San Francisco.

Latimer & Morrow and Frederick S. Stratton for appellant; George Cadwalader for respondent.

ROSS, J.—The findings show the plaintiff, Bliss, to be the true owner of the brandy in controversy. It was manufactured by one Belden, who was a licensed United States distiller, for the assignor of the plaintiff, for a certain sum per gallon. The brandy was made of grapes belonging to plain-

tiff's assignor, who, in order that the payment of the government tax of ninety cents per gallon might be delayed, in accordance with the laws of the United States, caused Belden to store it in a United States bonded warehouse. The law of the United States in respect to the matter required that such brandy should be stored in the name of the distiller, and it was accordingly done, Belden receiving a warehouse receipt therefor in his name. Subsequently, without any authority from Bliss, and without his knowledge, Belden sold the brandy to the defendant, Carroll, and transferred the warehouse receipt to him, and Carroll had another issued in his own name. Carroll paid Belden value for the brandy, and purchased it in good faith, and without any notice of any interest therein on the part of Bliss. As soon as the latter learned of the sale by Belden to Bliss, he tendered the amount of the government tax due on the brandy, together with the charges of the warehousemen, and demanded of the defendants that the brandy be transferred to his name on the records of the warehouse and on the records of the office of internal revenue, and be delivered to plaintiff, or his order, upon the payment of the taxes and charges, all of which was refused. Afterward, Carroll paid the government tax and removed the brandy.

The warehouse in which the brandy in question was stored was not an ordinary warehouse under the general commercial system of the country, but was a special bonded one, controlled and regulated by the act of Congress of March 3, 1877, and special treasury regulations of date May 15, 1877. The law governing the matter—of which all persons are bound to take notice—requires that all grape brandy placed therein shall be stored in the name of the distiller, but does not require that the distiller shall be the owner. He may or may not be. And of that fact all persons are bound to take notice. The plaintiff did not intrust Bliss with the brandy for the purpose of sale or transfer, but it was stored in the latter's name because the law said it should be so stored. We are of opinion that the facts of the case do not bring it within any exception to the general rule that a vendee acquires only the title of his vendor, and that the true owner can recover the possession of his property in the hands of a bona fide purchaser. But as defendant, Carroll, was required to pay

the government tax and the warehouse charges upon the brandy, it is but right that a refunding of the amounts so paid be imposed as a condition to the recovery by plaintiff.

Judgment reversed and cause remanded, with directions to the court below to render judgment upon the findings in plaintiff's favor against defendant, Carroll, for a return of the property, or its value, upon the payment or tender by plaintiff to said defendant of the amount of such tax and charges.

We concur: Morrison, C. J.; Sharpstein, J.; Myrick, J.; McKinstry, J.; Thornton, J.

DOANE v. BARBER.

No. 9336; December 23, 1885.

9 Pac. 89.

Assessment—Findings—Facts in Issue.—Where the Validity of an assessment is put in issue by the pleadings in an action, any fact or facts going to show that no valid assessment was ever levied are within the issues and properly included in the findings.

APPEAL from Superior Court, City and County of San Francisco.

J. M. Wood for appellant; Doyle, Barber & Scripture for respondent.

ROSS, J.—It was contended on behalf of the plaintiff that the third, fourth, and fifth findings of fact, on which the judgment given below rests, are not within the issues made by the pleadings, and cannot, therefore, be regarded. But the pleadings put in issue the question of assessment or no assessment (San Francisco v. Eaton, 46 Cal. 100), and any fact or facts going to show that no valid assessment was ever levied were, therefore, within the issues made by the pleadings. Judgment affirmed.

We concur: McKee, J.; McKinstry, J.

AGNEW v. KIMBALL.

No. 7772; December 23, 1885.

9 Pac. 91.

Sale—Instructions.—For Misleading and Contradictory Instruction as to the effect of the sale of personal property which was not in vendor's possession, and not accompanied by change of possession, judgment reversed.

APPEAL from Superior Court, County of Mendocino.

Wilson & Otis and T. B. Bond for appellant; T. L. Carothers, L. D. Latimer and C. C. Hamilton for respondent.

ROSS, J.—The defendant claimed that the logs, for the conversion of which he was sued, were orignially the property of Clark & Rutherford, and were by them sold to one A. H. Rutherford, and by the latter sold to the defendant. They were logs cut in the forests of Mendocino county, to be converted into lumber, and were, at the time of the sale under which the defendant claims, as well as at the time of the execution sale under which the plaintiff claims, scattered for a distance of several miles along the stream of water by which they were to be conveyed to the mill. The court below instructed the jury:

"If the jury believe from the evidence that there was a sale of the logs by Clark & Rutherford or A. H. Rutherford to the defendant, but that such sale was not followed by an immediate delivery and by an actual and continued change of possession thereof, then such sale was void as against the plaintiff. If the evidence shows that the owners of the logs sold them for a valuable consideration to Kimball, and that the logs were not in actual possession of the settlers at the time of sale, it was not necessary that the sale should have been accompanied by an immediate delivery, and followed by an actual and continued change of possession, to make the sale good and valid, and to transfer the title of them to Kimball; and, in connection with this, I will say that the sale, without such immediate possession, was a good sale, as

between the seller and buyer, but might not be good as against creditors. I don't say that it would not, but it might not be. I charge you that before a sale of the logs could have been made to Kimball, the defendant, the party selling to him must have been in the actual possession thereof, and must have actually delivered them to the defendant, in order for the sale to be good against the creditors of the party selling."

These instructions were clearly contradictory and misleading. Judgment and order reversed and cause remanded for a new trial.

We concur: McKee, J.; McKinstry, J.

DURKEE v. CENTRAL PAC. R. CO.*

No. 9067; December 23, 1885.

9 Pac. 99.

Principal and Agent—Declarations, Admissibility Against Principal.—Declarations by an agent or servant employed to perform a certain duty are not admissible against the principal, unless they are part of the facts and circumstances of some act happening within the scope of the servant's or agent's employment.

Railroad—Declarations of Engineer as to Cause of Injury.—In an action of damages for injury to a child by a railroad train, the declarations of the engineer concerning the accident, made from three to five minutes after the casualty happened are admissible against the principal as part of the res gestae.

APPEAL from Superior Court, County of Alameda.

McAllister & Bergin for appellants; H. F. Crane for respondent.

McKEE, J.—On the 2d of July, 1876, M. W. Durkee, a boy four or five years old, was run over by an engine belonging to and used at the time in the service of the corporation defendant. To recover damages for the personal injuries

*Reversed in bank. See 69 Cal. 533, 11 Pac. 130.

sustained by the boy on that occasion this suit was brought by his guardian ad litem against the railroad company, on the ground that the injuries were caused by the negligence of the company's engineer while driving the engine, which was attached to a train of cars running on the railroad from San Jose to Niles, in Alameda county. The evidence in the case tended to show that, on the day of the casualty, the train had arrived on the railroad track at the Warm Springs station at 4:35, and, according to schedule time, it was to leave there at 4:36. When it stopped at the station the nose of the pilot or cow-catcher just came to the south end of a trestle-work, which formed part of the railroad track across a creek at the station at a point where a county road, running east and west, crosses the trestle. The train was started on schedule time across the trestle at a speed of about six miles an hour, and, at that rate of speed, it had moved for about twenty feet on the south end of the trestle, when the engineer, seeing in front of him a human head rising up from between the ties, reversed his engine and called for brakes; but the train could not be stopped until the engine went over the boy. It was stopped within thirty or forty feet on the trestle, and the boy was taken out from under the engine, badly mutilated.

The main issue in the case was whether the boy was in such a position on the trestle that the engineer, by looking out in front, along the trestle before starting his train, could have seen him on the trestle, and have avoided the casualty; or whether the boy was so concealed under the trestle as to be hidden from sight until he raised up his head at the approach of the engine, when it was impossible to stop it without going over him. The jury found that there was no contributory negligence on the part of the boy or of his parents, and that the injuries to the boy were caused by the negligence of the engineer in failing to look out in front along the trestle to see that it was clear when he started his train to cross it. The verdict is sustained by the evidence. But it is founded, in part, upon testimony, given by one of the plaintiff's witnesses, of declarations as to how the casualty happened, which were made to him by the engineer about five minutes after the injury to the boy, and about three minutes after he had been taken from under the engine by one of the brakemen, who, at the time of the declarations, had the boy on his arms in

the county road, a short distance from the railroad track. The declarations, as testified by the witness, were: "I asked [the engineer] how it happened, and he said: When he started up the train he was looking up the road, toward Peacock's, to see if anyone was coming down, and when he turned around he saw the boy, and he blew the whistle, but when he reversed the engine it was too late, and he said that they took him out from between the hind trucks of the tender."

The admission of these declarations against the objection and exception of the defendant is assigned as an error. The declarations of a servant or agent, who is employed to perform a duty, are not admissible against the master or employer, unless they are part of the facts and circumstances of an act happening within the scope of the employment, for which it is sought to make the master liable. The facts and circumstances which grow, as it were, out of the act or transaction, and are contemporaneous with it, and serve to illustrate its character, are part of it. Thus, language used at the time of making an assault is part of the assault (MacDougall v. Maguire, 35 Cal. 279, 95 Am. Dec. 98), and declarations characterizing a transaction made "at the very time" of the transaction are part of it: Gerke v. Steam N. Co., 9 Cal. 257, 70 Am. Dec. 650. So, declarations voluntarily and spontaneously made by a person about half or three-fourths of a minute after he was shot by another, as to the person who shot him, have been held part of the circumstances of the shooting: People v. Vernon, 35 Cal. 50, 95 Am. Dec. 49. But declarations made after the fact has been fully consummated are not res gestae: People v. English, 52 Cal. 212; Innis v. The Senator, 1 Cal. 459, 54 Am. Dec. 305; Mateer v. Brown, 1 Cal. 224, 52 Am. Dec. 303. The code rule upon the subject is: "Where the declarations . . . . form part of a transaction which is itself the fact in dispute, or evidence of that fact, such declarations . . . . are evidence as part of the transaction": Code Civ. Proc., sec. 1850.

Under this rule the main difficulty in determining the admissibility of the declarations of the engineer in the case in hand arises out of the consideration of the contemporaneousness of the casualty to the boy and the declarations concerning it. As has been observed: "What lapse of time is embraced in the word 'contemporaneous' is often a question of difficulty.

Perfect coincidence of time between the declaration and the main fact is not of course required. It is enough that the two were substantially contemporaneous; they need not be literally so. The declarations must, however, be so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so closely connected with it as virtually to constitute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. The evidence offered must not have the earmarks of a device or afterthought, nor be merely narrative of a transaction which is really and substantially past": Alabama G. S. R. Co. v. Hawk, 72 Ala. 117, 47 Am. Rep. 403.

It is upon these legal principles that the American courts have generally decided the question of contemporaneousness of fact and declaration.

In Commonwealth v. McPike, 3 Cush. 181, 50 Am. Dec. 727, objections were made to the declaration of a woman, who, after having been stabbed in her own room, ran bleeding out of the room, up a flight of stairs and into a room occupied by another, where, having fallen on the floor, she lay until a person outside, who heard her cries, went and brought a watchman, to whom she made the declaration. The objections were overruled and the declaration admitted, and it was held, on appeal, that the time when the declaration was made was so recent after the injury as to justify receiving it as evidence. Where it appears, says the same court, that the declarations "were uttered after the lapse of so brief an interval and in such connection with the principal transaction as to form a legitimate part of it, and to receive credit and support as one of the circumstances which accompanied and illustrated the main fact which was the subject of inquiry before the jury, they are res gestae": Commonwealth v. Hackett, 84 Mass. (2 Allen) 139.

So, in Insurance Co. v. Mosley, 8 Wall. 397, 19 L. Ed. 437, which was an action upon an accident insurance policy, in which the subject of inquiry before the jury was whether the deceased died from an injury caused by an accident; and the plaintiff in the action gave evidence tending to show that before the alleged accident the insured had arisen from his bed about 12 or 1 o'clock at night, went downstairs and came back,

and when he came back he stated "that he had fallen down the back stairs and almost killed himself"—it was insisted that this declaration was no part of the res gestae. Exactly what time elapsed between the accident and the declaration does not appear in the case, but the supreme court of the United States held the declaration admissible. "In the complexity of human affairs," say the court, "what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. . . . . The res gestae are the statements of the cause made by the assured almost contemporaneously with its occurrence. . . . . The tendency of recent decisions is to extend rather than to narrow the scope of the doctrine."

Hanover R. Co. v. Coyle, 55 Pa. 396, was an action by a peddler, who was run over by a locomotive of the defendant, to recover damages for injuries to himself, his wagon, and his goods. On the trial the plaintiff, against the objection and exception of the defendant, gave evidence of the declarations of the engineer as to the accident; and the supreme court, in passing upon the exception, say: "We cannot say that the declaration of the engineer was no part of the res gestae. It was made at the time of the accident, in view of the goods strewn along the road, by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declaration made upon the spot at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the transaction itself."

To the same effect will be found Waldele v. New York Cent. & H. R. Co., 95 N. Y. 284, 47 Am. Rep. 41; State v. Garrand, 5 Or. 217; Ohio & Mississippi Ry. Co. v. Porter, 92 Ill. 437.

Applying to the declarations of the engineer elicited in this case the doctrine of those cases, we think the lower court did not err in overruling objections to their admissibility as res gestae. The declarations were voluntary statements, made by the engineer while standing in his engine at the place where the casualty occurred, just after the boy was taken out from "between the hind trucks of the tender," and while he was in view, in the arms of the brakeman, who was carrying him to his father's house. Although they were not literally simulta-

neous with the casualty, yet they were obviously elicited by it, and following it in such close connection as to be apparently the spontaneous expression of the natural consciousness of it, while the engineer was still under the heat and excitement of the circumstances in which it happened. Made in such circumstances, the declarations cannot be regarded as an afterthought, nor as the expression of a mere narrative of a transaction which had been consummated and become an event of the past. They were made after the injury had been inflicted, and the transaction in which the cause of the injury occurred was in process of passing away, but had not wholly passed, and was not quite completed. They were therefore part of the transaction and admissible as evidence.

We find no prejudicial errors in the record. Judgment and order affirmed.

We concur: Ross, J.; McKinstry, J.

SMITH v. ROBARTS.

No. 9270; December 23, 1885.

9 Pac. 104.

Boundaries—Possession Under Mistake as to Division Line.—Where coterminous proprietors are in possession of certain land under a mutual mistake as to the division line, such possession has no effect upon their legal rights, nor is it adverse or conclusive against the assertion of any existing rights based upon the true title.[1]

Boundaries — Verbal Agreement Concerning. — Where coterminous proprietors enter into a verbal agreement to have the true division line surveyed, and to abide by the line so established, such agreement is binding, and is not within the statute of frauds.[2]

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[1] **Cited** in Breen v. Donnelly, 74 Cal. 304, 15 Pac. 846, and approved as a general rule in ejectment suits, but held not to the same extent applicable to suits for reforming deeds.

Cited with approval in Marsicano v. Luning (Cal. App.), 125 Pac. 1083, where the court questions if title by adverse possession can be acquired under such circumstances.

[2] **Cited** and approved in Woodward v. Faris, 109 Cal. 17, 41 Pac. 783, where the statute of limitations was held not to apply to a case where a party has put up his fence at random, intending to remove it to the correct line upon its being determined.

Cited in a note in 33 L. R. A., N. S., 939, on adverse possession due to ignorance or mistake as to boundary.

APPEAL from Superior Court, County of Humboldt.

J. J. De Haven and G. W. Hunter for appellant; S. M. Buch, Cope & Boyd and P. F. Hart for respondent.

McKEE, J.—This case originated in an action commenced in a justice's court to recover damages for a trespass on real property. To the complaint in the action there was filed a verified answer, which presented issues involving title and possession of the property, and the justice transferred the action to the superior court, where, trial being had, judgment was entered for defendant. The contention is that the judgment is erroneous, because the decision on which it was given is not sustained by the evidence. But the evidence shows, and the court finds, that plaintiff and defendant were coterminous proprietors of two eighty-acre tracts of land in the northwest quarter of section 3, township 2 north, range 2 west, Humboldt meridian—plaintiff being owner and in possession of the southwest quarter, and defendant owner and in possession of the southeast quarter, of the quarter section; that the defendant entered upon the land and dug post-holes thereon for a divisional fence between the two tracts, the digging of these holes constituting the trespass of which the plaintiff complained; and that the true divisional line, run according to the United States survey, located the strip of land on which the holes were dug within the tract belonging to the defendant. The line as surveyed was therefore the true divisional line. But it also appeared in the evidence that, in the year 1871, the grantors of the respective parties established a different line, on which they built a fence, partly of posts and rails and partly of brush, which they, at the time, and for several years thereafter, recognized as the line; and, according to that line, the locus in quo belonged to the plaintiff. Those who established it, however, were never satisfied that the fence was on the true line; but they recognized it as on the line for several years until they both ascertained, by tape measurement, that it was not; and then, as the plaintiff's grantor testified, "when ascertained that the division made by me and Mr. Cris (the grantor of defendant) gave me more than an equal division, I was willing that it should be set back so as to make it equal." The fence, however, was

allowed to stand, and the grantor of the defendant continued to cultivate up to it until 1880, when he transferred to the defendant his title to the southeast quarter of the quarter section; and the defendant, after the acquisition of title, verbally agreed with the plaintiff to have the line surveyed, and to abide by the line established by the survey. Under that agreement the line was surveyed in 1881, and the defendant built his house upon it in 1882.

In Biggins v. Chaplin, 59 Cal. 113, and Cooper v. Vierra, 59 Cal. 282, we held that the location of a doubtful divisional line by agreement of coterminous proprietors, which has been acquiesced in for a greater length of time than that prescribed by the statute of limitations to bar a right of entry on land, was conclusive evidence of the correctness of the line. Sneed v. Osborn, 25 Cal. 619, is to the same effect. And in Columbet v. Pacheco, 48 Cal. 395, it was held that mere acquiescence, without controversy, in a fence line, which was renewed from time to time, by the coterminous owners, for twenty years, estopped both from denying that it was the true line. But, in the case in hand, acquiescence in the fence line as the true divisional line of the respective tracts of land was not considered by the grantors of the parties in the case as binding between them. Both agreed and recognized the fact that it was a mistake, and that any portion of the land of either tract which was held by the other was held under a mutual mistake. A possession of land held under a mutual mistake has no effect upon legal rights; it is not adverse or conclusive against the assertion of any existing rights upon the true title: Irvine v. Adler, 44 Cal. 559; Sheils v. Haley, 61 Cal. 159; Allen v. Reed, 51 Cal. 362. Such a possession neither vests nor devests title to real property. The verbal agreement between the plaintiff and defendant to have the true line surveyed, and to abide by the line established by the survey, was therefore binding. The fixing of a boundary line is not within the statute of frauds: Kincaid v. Dormey, 47 Mo. 337; Kellum v. Smith, 65 Pa. 86; Orr v. Hadley, 36 N. H. 575.

There is no error in the record. Judgment and order affirmed.

I concur: Ross, J.

I concur in the judgment: McKinstry, J.

PETERSON v. HUBBARD.

No. 9298; December 23, 1885.

9 Pac. 106.

Contract—Action for Breach—Pleading—Answer.—Where, by a Stipulation in an agreement, the party agreed that, in building a certain mill, he would not let any sawdust or rubbish be put into the stream, so as to prevent the use of the stream by plaintiff's family, in an action for breach of such stipulation an allegation in the answer that the defendant prevented the sawdust and rubbish from being carried down by the stream, and that the waters thereof were not rendered impure, etc., by reason of such sawdust and rubbish, constitutes a valid defense.

Contract—Payment.—In an Action for Breach of Contract, settlement and payment in full is a valid defense.

Findings—Affirmative Defense.—Where in an Action judgment is rendered for defendant, a finding upon an affirmative defense not supported by proof is unnecessary.

APPEAL from Superior Court, County of Santa Cruz.

Z. N. Goldsby for appellant; A. E. Bolton for defendant.

McKEE, J.—In this case the appellant contends that the judgment and order appealed from should be reversed, because (1) the court below erred in overruling a general demurrer to those portions of defendant's answer designated as his second and third defenses; (2) because the decision and judgment of the court are based on the findings of particular facts which were not within the issues of the case, and also upon certain facts which were not sustained by the evidence; and (3) because of a want of finding upon some of the material issues in the case. The case arises out of an action to recover damages for the breach of a contract by which the defendant agreed to build a sawmill upon a tract of land situated on the forks of Collins creek, in Santa Cruz county, and manufacture into lumber the timber upon it, for which payment at a stipulated price was to be made to the plaintiff. Construction of the mill, the manufacture of lumber thereat, from April, 1880, until January, 1881, and payment to the

plaintiff, according to the terms of the contract, were admitted. But it appears at the date of the contract the plaintiff had a flume on the land on which the contract was to be performed, by which he obtained from the creek a supply of water for domestic purposes, at his house and premises bordering on the creek. This flume extended from a point in the creek about seven hundred yards below the millsite on which the mill was to be built, and the contract contained a stipulation that "the said Hubbard is not to let any sawdust or rubbish be put into said streams of water so as to injure and prevent the use of the same for his said Peterson's, family use." This agreement, it is charged, the defendant violated by depositing, and causing to be deposited, on the banks of the creek, and in the creek, at and near the mill, large quantities of "sawdust and other rubbish," which were brought down by the creek into and through the plaintiff's flume to his house and premises, "rendering the water impure, corrupt, unwholesome, and unfit for family use," to his great damage. The answer filed by the defendant contained a general denial, and also separate statements of facts, by way of defense, showing (1) impossibility of building and operating the mill so as to stop the fall of sawdust and rubbish from the mill into the stream, and performance of the contract by lawful and proper means, which prevented the sawdust and rubbish from being carried down by the stream, or through the plaintiff's flume, so as not to injure or render impure the water which flowed through the flume to the plaintiff's house and premises; and (2) performance of the contract by settlement and payment in full.

There was no prejudicial error in overruling the general demurrers interposed to those special defenses. The object of the contract was to prevent sawdust and rubbish from the mill, which would, of necessity, fall into the creek while operating the mill, from "being put into said streams of water so as to injure and prevent the use of the same for the plaintiff's family use." That object was achievable. However inconvenient it might be, it was not impossible. Performance of the contract was therefore possible (Civil Code, section 1597), and defendant was bound to perform it. But he was entitled to allege and prove substantial performance of the contract, and the allegations that he did, by lawful and proper

means, prevent the sawdust and rubbish from the mill from being carried down to the plaintiff's flume, and that the water of the creek which flowed through the flume to the plaintiff's house and premises was not injured or rendered impure, corrupt, unwholesome, or unfit for use by the sawdust and rubbish from the mill, constituted a valid defense.

Settlement and payment in full also constitute a valid defense to an action for an alleged breach of the contract.

The facts found by the court were within the issues made by the answer and complaint. The finding covers the issues, and it is sustained by the evidence in the case.

There was no finding necessary upon the defense in the answer of settlement and payment, because the defense was not supported by proof: Campbell v. Bear R. & A. W. & M. Co., 35 Cal. 682.

Judgment and order denying a new trial affirmed.

I concur: Ross, J.

I concur in the judgment: McKinstry, J.

NISSEN v. BENDIXSEN.*

No. 9088; December 28, 1885.

9 Pac. 111.

Husband and Wife—Liability for Necessaries Furnished to Wife.—In an action against a husband for necessaries furnished his wife, the complaint must allege that the goods were sold and delivered to defendant and an averment of the furnishing of such goods to the wife is not sufficient. Although no demurrer to the complaint was filed, the absence of such necessary averment may be taken advantage of on appeal.

APPEAL from Superior Court, County of Humboldt.

S. M. Buck and Cope & Boyd for appellant; J. J. De Haven and Charles F. Hanlon for respondent.

*For subsequent opinion in bank, see 69 Cal. 521, 11 Pac. 130.

FOOTE, C.—This action was brought against a husband for necessaries furnished his wife, under the provisions of section 174, Civil Code. A jury being waived, the court rendered judgment in favor of the plaintiff for part of his demand. From that, and from an order refusing him a new trial, defendant Bendixsen appeals. The testimony of the plaintiff's witnesses was all by depositions. The defendant appeared and gave evidence in open court. There is a conflict in their testimony. When this is the case, it is a settled rule of law, as declared by this court in numerous instances, that for such reason alone a judgment will not be reversed. But the further point is made that the complaint therein does not state facts sufficient to constitute a cause of action, and will not support a judgment such as the one rendered. It is claimed that although section 174 of the Civil Code gives a right of action, it confers no other or greater right than that which existed at common law, and that it did not intend to change, nor does it change, the rule of pleading as to averments which were necessary in such a case at common law. The complaint does not allege that the articles were sold to the husband, defendant, or that they were furnished his wife upon his credit.

Upon a pleading resembling the one in hand, the opinion of this court was expressed in Simon, Jacobs & Co. v. Scott, 53 Cal. 74, as follows:

"The complaint does not allege a sale and delivery of goods to defendant. Whether the defendant is liable for the goods furnished to the wife or not, it is certain that plaintiffs cannot recover against him their value, in the absence of an averment that they were sold and delivered to him. If she was authorized by reason of her relation to her husband, the nature and character of the goods, and the husband's circumstances, to purchase them, the goods were in law sold to defendant, and the averments should have been to that effect. The averments in respect to furnishing the goods to his wife, etc., might have been omitted as mere evidence, and not the statement of ultimate facts."

In the case under consideration no demurrer to the complaint was filed, but, under section 434 of the Code of Civil Procedure, the objection now taken to that pleading may be entertained by this court.

We are of opinion that the judgment and order should be reversed and cause remanded, with leave to the plaintiff, if so minded, to amend his complaint.

We concur: Belcher, C. C.; Searls, C.

By the COURT.—For the reasons given in the foregoing opinion, the judgment and order are reversed and cause remanded, with leave to plaintiff, if so advised, to amend his complaint.

MAY and Others v. STEELE.

No. 9120; December 28, 1885.

9 Pac. 112.

Assault and Battery—Excessive Damages.—In an action for damages caused by a beating, a verdict of thirteen hundred dollars will not be set aside as excessive.

APPEAL from Superior Court, County of Alameda.

This action was brought to recover damages for injuries sustained by a beating, inflicted on plaintiff by the defendant. Verdict was rendered in plaintiff's favor for thirteen hundred dollars. Defendant appealed.

J. B. Lamar for appellant; J. B. Ogden for respondents.

By the COURT.—Appeal from a judgment and order denying a new trial in an action to recover damages for personal injuries. Two assignments of error are made in the case: (1) That the verdict is not justified by the evidence; (2) that the damages awarded are excessive.

As to the first, there was a substantial conflict in the evidence. The verdict must therefore be taken as conclusive of the facts.

As to the second, we cannot say, as matter of law, that the verdict was given under the influences of passion, prejudice, or bias of any kind.

Judgment and order affirmed.

HARRISON v. McCORMICK and Others.

No. 9215; December 28, 1885.

9 Pac. 114.

Pleadings—Cross-complaint and Answer.—A Cross-complaint in an Action must be as distinct and separate from the answer therein as any other independent pleading in the cause, and each must rest on its own merits.

Pleading.—Where an Answer and Cross-complaint are Both Joined in the same pleading, an objection thereto is deemed waived if the plaintiff consented in writing to allow such pleading to be filed and stand as defendant's answer and cross-complaint.

APPEAL from Superior Court, City and County of San Francisco.

Castlehun & Firebaugh for appellants; Craig & Meredith for respondent.

SEARLS, C.—This is an action to recover a balance due on a contract for the sale and delivery of fifty tons of coal. Plaintiff had judgment, and defendants appeal therefrom, and from an order denying a new trial, and from an order refusing to strike out plaintiff's cost bill.

We think this cause must be reversed and a new trial ordered.

Defendants filed what is denominated an "amended answer and cross-complaint," in which they first deny the allegations of the complainant and then proceed to set up matters, some of which, at least, if not all, might have been pleaded as a defense to the action, or as a counterclaim, or as a cross-complaint. The pleading closes by demanding affirmative relief, as in an ordinary cross-complaint. We should, under ordinary circumstances, decline to treat the pleading as a cross-complaint requiring to be answered, for the want of a separate and distinct setting out of the matters contained in it. A cross-complaint should be as distinct and separate from an answer in the same case as any other independent pleadings in the cause. Each must stand or fall upon its own merits. The very objections, however, which might otherwise be urged

to the pleading, seem to be waived in the acceptance of service by plaintiff's attorneys. Such acceptance reads as follows:

"Service of within admitted made this second day of December, 1882, and we consent that the same be filed and stand as and for defendant's answer and cross-complaint herein.

"CRAIG & MEREDITH,

"Plaintiff's Attorneys."

The parties having treated the pleading as a cross-complaint, we do not feel at liberty to strangle it because of its hybrid character. To this cross-complaint there is no answer on file. Treating its allegations as true, plaintiff was not entitled to a judgment. The judgment should be reversed, and leave granted the parties to amend their pleadings, if so advised, and for plaintiff to answer the cross-complaint.

We concur: Belcher, C. C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded, with leave to the respective parties to amend their pleadings, if so advised.

WILLIAMS v. SOUTHERN PAC. R. CO.*

No. 9272; December 28, 1885.

9 Pac. 152.

Appeal.—A Statement on Motion for a New Trial, When Certified by the Judge of the court in the manner provided by law, and filed with the clerk, becomes part of the record; and if the notice of motion for a new trial specifies that such motion will be based on a statement of the case, it will be presumed that such statement, prepared, settled and filed, was used on the hearing of the motion; and on appeal, if it is part of the record certified by the clerk, it will be considered, without further identification or proof, that it was used on the motion for a new trial.

Negligence—Contributory Negligence—Proximate Cause of Injury.—One who by his ordinary negligence or willful wrong, has proximately contributed to an injury caused by the mere negligence of

*For subsequent opinion in bank, see 72 Cal. 120, 13 Pac. 219.

another, cannot recover compensation therefor, if but for his concurring and co-operating fault the injury would not have happened, unless the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former is exposed, to avoid the injury by the use of a proper degree of care.[1]

Railroad—Lying Down on Track While Intoxicated.—A person is guilty of gross negligence who, in a state of intoxication, lies down upon a railroad track; and the company is not liable if he is injured by a passing train, unless, in the exercise of reasonable care after the person is discovered in his exposed position, it could have avoided the injury.[2]

Railroad—Duty as to Trespasser Asleep on Track.—It is the duty of a railroad company and its employees, when a person is discovered asleep or helpless upon its track, to use all reasonable care by stopping its train so as to prevent injury; and failing in this duty, it becomes liable for injury to such persons, though they may have been guilty of contributory negligence, the injury being in such cases due to the willful or wanton act of the company as the proximate cause, and not to the negligence of the injured party. No presumption arises from the absence of care to watch for trespassers upon a track; and, in order to recover, a trespasser who is injured, being himself negligent, must show, not merely that he might have been seen, but that he was in fact seen in time, and under such circumstances as to render it the duty of the company to check the progress of its train.

Negligence—Contributory Negligence—Question for Court or Jury.—The question of contributory negligence, when left in doubt by the evidence, should be submitted to the jury, under proper instructions; but when the evidence is clear as to the facts, the question is one of law for the court.

APPEAL from Superior Court, County of Monterey.

S. F. Geiland and H. V. Morehouse for appellant; D. M. Delmas for respondent.

SEARLS, C.—This is an action to recover damages for an injury received by the plaintiff from defendant's railroad cars.

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[1] **Cited** with approval in Basler v. Sacramento Gas etc. Co., 158 Cal. 519, Ann. Cas. 1912A, 642, 111 Pac. 532, where it is held that the vigilance a defendant is charged with to prevent injury, notwithstanding the plaintiff's contributory negligence, is not satisfied by a defendant for whom it is urged only that "he was engrossed with his own affairs."

Cited in a note in 31 L. R. A., N. S., 1032, 1035, on the subject of last clear chance.

[2] **Cited** with approval in Foley v. McMahon, 114 Mo. App. 445, 90 S. W. 114, as authority for one's not being required to anticipate an accident that has never occurred before.

Plaintiff had judgment for fifteen thousand dollars, from which judgment, and from an order denying a motion for new trial, defendant appeals.

The material averments of the complaint are that defendant is a corporation, the owner and manager of a certain railroad extending southerly from the town of Castroville, in the county of Monterey, to the city of Salinas, in the same county, and of the rolling stock on such road; that on the twenty-third day of July, 1882, the defendant was running a train, composed of a locomotive engine and cars, on said road; and that, through the negligence, carelessness and fault of the defendant in running and operating such train, the same struck and ran over the plaintiff, the wheels thereof passing over and crushing the right foot of plaintiff, so that it had to be, and was on the same day, amputated above the ankle-joint. The answer denies all negligence, carelessness or fault by or on the part of defendant, and avers that whatever injuries or damages were received, suffered or sustained by said plaintiff were in consequence solely of the negligence and culpable carelessness of the plaintiff, without any fault on the part of defendant.

It is urged by counsel for respondent that the statement on motion for new trial cannot be considered by this court, because, as is contended, there is nothing in the record showing that the statement was used on the motion. The statement was settled by the superior judge, and duly certified as true and correct on the third day of September, 1883, and thereafter, on the seventeenth day of September, the motion for a new trial was by the court denied. The record on appeal is properly certified by the clerk of the county of Monterey and ex officio clerk of the superior court in and for said county. We are referred to Nash v. Harris, 57 Cal. 242, and Simpson v. Ogg, 18 Nev. 28, 1 Pac. 827, in support of respondent's contention.

In Nash v. Harris, which was a motion to set aside a judgment, certain affidavits and papers were on file, but which were not embodied in any statement or bill of exceptions, or in any way authenticated, and the court, after holding that they were in no way identified as having been used on the motion, proceeds as follows: "We cannot indulge in presumptions of papers which were used in the court below on the

hearing of a motion. To be considered, they must be made part of the record of the case, by a bill of exceptions, or be authenticated by the judge who tried the case, in such a way as to leave no doubt, when found in the transcript, that they are the papers which were before him when he acted, and upon which he decided. Unauthenticated papers in a transcript in which there is no bill of exceptions constitute no part of a record which can be considered upon appeal."

In Simpson v. Ogg the supreme court of Nevada held that a statement on motion for new trial, based upon a statement not agreed to by the parties or their attorneys, and not certified as correct by the judge, in accordance with the statute, could not be considered on appeal.

The object of a statement or bill of exceptions is to make that record which before was not record, but rested only in the recollection of the court or counsel, or the minutes of the clerk: De Johnson v. Sepulbeda, 5 Cal. 149. And when a statement on motion for new trial is certified by the judge of the court in the manner provided by law, and filed with the clerk, it becomes a part of the record. It is not the filing of a document, like that under consideration, which gives to it its character as a record, but the certificate of the judge as provided by section 659 of the Code of Civil Procedure, and the filing thereof, which impresses it with that character.

The notice of motion for a new trial in this case specified, among other things, that the motion would be based on "a statement of the case." The statement was prepared, settled and authenticated by the judge, and filed in due time. Thus prepared, settled and filed, it will be presumed it was used on the hearing of the motion for new trial; and, coming here as a part of the record on appeal under section 661 of the Code of Civil Procedure, duly certified by the clerk, it is entitled to consideration, without further identification or proof that it was used on the motion for a new trial: Towdy v. Ellis, 22 Cal. 651. It occupies a different position from affidavits and papers having no official sanction, and which, although filed, require official designation to identify them as having been used.

Plaintiff, being intoxicated, laid down alongside defendant's railroad, and fell asleep, with his feet so near the rail that a passing passenger train struck and crushed his right foot,

rendering amputation necessary. The place of the accident was near a private crossing of the railroad, known as "Kelleher's Crossing," between Castroville and Salinas, and from one mile to one and a half miles from the latter place. The injury was caused by the engine of defendant's regular passenger train, bound south, and running from eighteen to twenty miles per hour, over a straight road and level track. Defendant's engineer, in charge of the train, saw plaintiff alongside the track, and stopped his train, but not until the engine had struck him, and passed nearly or quite its length beyond the point where he lay. The case depends largely upon the question of contributory negligence by plaintiff.

He who is injured by the mere negligence of another cannot recover compensation therefor, if, by his own ordinary negligence or willful wrong, he proximately contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him; except where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former is exposed, to use a proper degree of care to avoid injuring him. The rule, as thus stated, is that laid down by Shearman & Redfield on Negligence (section 25), and is amply supported by authority.

When plaintiff laid down upon the line of defendant's railroad, over which, as he knew, trains were running, and in such proximity to its track that he was liable to injury from such passing trains, that he was guilty of negligence cannot be doubted. He was a trespasser upon the roadway—was at a point thereon where he had no right to be. It is true, he had been expelled from defendant's cars for alleged nonpayment of fare some three hours previously, at or near the point where he was injured, and, for a reasonable time thereafter, may be deemed to have had a license to be upon the line of the road; but the evidence tends to show that he visited a house near at hand and returned to the place of his injury. Such expulsion from the cars could give him no permanent right to locate and remain upon the road.

A man may contribute to his injury without affecting his right to recover. In order to defeat his right to recover, he must have not only contributed to the injury, but must have contributed to it under circumstances showing negligence on

his part. He must have been in fault, must have failed to use ordinary care for his own protection, and the want of such care must not only have contributed, but have contributed proximately, to the injury. "Walking along the track of a railroad, where it does not run upon a highway, is culpable negligence. . . . . Lying down upon a railroad is obviously the grossest negligence, which nothing can well excuse": Shearman & Redfield on Negligence, sec. 487; Louisville R. Co. v. Burke, 6 Cold. (Tenn.) 45; O'Keefe v. Chicago R. Co., 32 Iowa, 467; Illinois Cent. R. Co. v. Hutchinson, 47 Ill. 408; Herring v. Wilmington R. Co., 10 Ired. (N. C.) 402, 51 Am. Dec. 395.

In Felder v. Louisville R. Co., 2 McMull. (S. C.) 403, and Richardson v. Wilmington R. Co., 8 Rich. (S. C.) 120, slaves were asleep upon the track, and were killed, without any effort to stop the train; but it did not appear that the engineer saw them. The companies were held not to be liable. The case of Herring v. Wilmington R. Co., 10 Ired. (N. C.) 402, 51 Am. Dec. 395, was in many respects parallel with this. The plaintiff's slave lay down to sleep in the daytime, on a railroad track, where the train could have been seen for more than a mile. The cars approached at their usual speed, at the usual hour; and the engineer, when within a short distance of the slave, attempted to stop the engine by letting off the steam and reversing the wheels. And it was held the company was not liable.

We think it follows that in the case at bar the negligence of plaintiff was not only the cause of his injury, but the proximate cause of such injury. By proximate cause we must be understood as meaning "that cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue": Shearman & Redfield on Negligence, sec. 10. He was not, therefore, entitled to recover, unless, notwithstanding such negligence, defendant was guilty of some wanton or willful act whereby the injury was caused to plaintiff: Maumus v. Champion, 40 Cal. 121.

In Weymire v. Wolfe, 52 Iowa, 533, 3 N. W. 541, the court said: "If a person lies down upon a railroad track in a state of helpless intoxication, the company will not be justified in running a train over him, if it can be avoided in the exercise

of reasonable care after the person is discovered in his exposed position."

One wrong or injury cannot justify or excuse another. A railroad company engaged in the carrying of passengers owes important duties to the public. It must use great care in furnishing all proper appliances for the safe conduct of persons confided to its care. It must transport its living freight with all reasonable speed, and its paramount duty is to look to the safety and welfare of the traveling public who may choose to patronize it. It should not be delayed in its rapid transit by trespassers upon its track, whose presence may impede and endanger its patrons.

It does not follow that it may with impunity run over, injure and destroy persons wrongfully upon its road. The right to inflict wanton, willful or needless harm does not exist. As to persons walking upon its track, and apparently in possession of their faculties, it is not bound to slacken the speed of its trains, but may warn them by proper signals, and rely upon their instinct of self-preservation to take them from danger. As to a person, although wrongfully upon its road, known by a railroad company to be both blind and deaf, it would clearly be its duty to stop its train and remove the intruder. So of a person asleep or helpless or unjudging upon its track. Upon discovering him, as the presumption is that he cannot help himself, it becomes the duty of the company and its employees to use all reasonable care, by stopping its train, so as to prevent injury to one helpless to save himself from impending danger. At other than places upon its road where persons have a right to be, the company is not bound, except in behalf of its own passengers, to watch for trespassers upon its tracks; but if, at any time and at any place, it discovers persons upon its road, apparently unable to protect themselves from its passing trains, it becomes its bounden duty to use all reasonable care and diligence to prevent their being injured; and, failing in this duty, it will become liable for injury to such persons, although they may have been guilty of contributory negligence, the injury being in such cases attributed to the willful or wanton act of the company as the proximate cause, and not to the negligence of the injured party. For trespassers, a railroad company is not bound to be watchful, hence no presumption of negligence arises from the absence

of such care as to such persons. As to a trespasser upon the road, who is injured, being himself negligent, the evidence should show, not merely that he might have been seen, but that he was in fact seen, in time and under circumstances rendering it the duty of the company to check the progress of its train, before it can be held liable for an injury to such wrongdoers.

The testimony on behalf of plaintiff failed to show that when he was discovered on its road defendant failed in its duty. The only testimony to that point served to show that the alarm signal was given by the usual short, sharp blasts from the steam-whistle, and that the train was suddenly stopped—more suddenly than when passing at a station.

If we look to the evidence of defendant, plaintiff's case is not helped. The substance of the engineer's testimony is that on Sunday afternoon, July 23, 1882, as he was going south with his train, his attention was first attracted by an object ahead, and near the track, which afterward proved to be a bundle of blankets; that a little later he saw another object farther in advance, which seemed like a man, and which he discovered to be a man; that he jumped from his seat, jumped for his reverse lever, threw it off, put on the air-brakes, and, having reversed his engine, opened the throttle and gave it steam; that his fireman also applied the tender-brake. He says this was all that could be done to stop the train; that, instantly upon seeing the man, he did all in his power to stop, but was unable to do so before the engine reached him.

Where the question of contributory negligence is left in doubt by the evidence, it should be submitted to the jury, under proper instructions; but where the evidence is clear as to the facts, the question of contributory negligence is one of law for the court: Fernandes v. Sacramento Ry. Co., 52 Cal. 45.

Under the rule as enunciated by this court in Needham v. San Francisco & S. J. R. Co., 37 Cal. 409; Kline v. Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 282; Maumus v. Champion, 40 Cal. 121; Tennenbrock v. South Pac. C. R. Co., 59 Cal. 271—and which we do not understand to be in conflict with the principles declared in Meeks v. Southern Pac. R. Co., 56 Cal. 513, 38 Am. Rep. 67—we are of opinion that upon the facts as presented by the plaintiff a nonsuit should have been granted, and that upon the verdict of the jury a new trial

should have been awarded to defendant, and consequently that the judgment and order denying a new trial should be reversed and a new trial ordered.

We concur: Belcher, C. C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

McNALLY v. CONNOLLY.

No. 8864; December 29, 1885.

9 Pac. 169.

Action to Recover Personal Property—Demand.—In an action to recover personal property, or its value, where it appears that the property came lawfully into the possession of the defendant, a demand and refusal to deliver must be shown; but if the original possession of the property was acquired by tort, no demand previous to the institution of the suit is necessary.

Action to Obtain Possession of Real Property—Demand.—One acquiring title to real property who is not in possession is entitled to be let into possession on demand, and, until such demand, he cannot maintain an action to obtain possession against a person who is lawfully in possession.

Fixtures—Engine and Machinery.—Where a tenant of real property, with the permission of the owner, erects an engine and boiler on a foundation made of brick and of timbers sunk into the ground, and attaches such engine and boiler and machinery to a building which is part of the realty by means of bolts and screws which are easily removed; quaere, whether such boiler and engine constitute real or personal property.

APPEAL from Superior Court, City and County of San Francisco.

Chas. F. Hanlon and W. C. Flint for appellant; Mich. Mullany for respondent.

SEARLS, C.—This is an action to recover possession of certain personal property, if possession can be had, and, if not,

the value thereof. Defendant had judgment, from which, and from an order denying a new trial, plaintiffs appeal. In 1876, Owen Connolly, the defendant, took a lease of a lot of land on Fourth street, near Berry, in the city of San Francisco, for a term which was to expire January 1, 1881. There was a brick building upon the lot, but which did not cover the whole of it. Connolly paid his rent in full for the term, formed a copartnership with Charles D. Wheat, and, as such copartners, under the firm name of Connolly & Wheat, they proceeded to place upon said lot of land an engine, boiler and machinery for a flouring-mill, which machinery is the subject matter of the controversy in this action. The engine and boiler were erected in a wooden building adjoining the brick structure, and the motive power was communicated therefrom to the machinery by means of a shaft, or shafts, extending into and through the brick structure. The foundation for the engine and boiler was made by sinking timbers in the ground from six inches to two feet, upon which a brick foundation was built, and the bed of the engine was placed upon the brick work and fastened to the wooden foundation beneath by bolts and screws. The mill-stones were bolted fast to the floor. Pieces of timber were put in the brick walls and bolted through in the upper part of the building, to which the machinery was attached. The whole machinery seems to have been securely attached to the building and to have been solid and substantial, but was secured and fastened, usually, by bolts and screws, which could be removed without material injury to the building, while some bridges were bolted directly to the walls of the building. The principal difference in securing the machinery from that ordinarily pursued consisted in using bolts with screws instead of nails. The machinery was by this means securely fastened to the building, and was solid. The machinery was placed in the buildings with the understanding that the tenant should be at liberty to remove it; and, with that end in view, it was substantially attached to the realty, but with bolts and screws, in order that it might be severed with the least possible injury to the realty. In 1877 plaintiffs herein brought an action against Connolly & Wheat to recover two thousand nine hundred and sixty-six dollars and sixteen cents, and caused a writ of attachment to issue, which was levied upon the right,

title and interest of defendants in and to the lot of land and premises so leased as aforesaid. The sheriff, also, by direction of plaintiffs, at the same time attached the machinery now in controversy as personal property. Plaintiffs had judgment, and thereafter caused an execution to issue, under which the sheriff levied upon the real estate or lot having the mill and machinery thereon, and afterward, on the nineteenth day of October, 1877, sold the same in due form as real estate, plaintiffs becoming the purchasers, and no redemption having been had, said plaintiffs, on the fourth day of May, 1878, received a sheriff's deed in due form of said land and premises. Defendant Connolly having, prior to the expiration of the lease, removed the machinery, or most of it, this action was brought. A demand of possession by plaintiffs from defendant is averred to have been made on the thirty-first day of December, 1880. The answer denies specifically that any demand for delivery or possession was ever at any time made, and the court finds that no demand was in fact ever made.

We have examined the record in vain for evidence of a demand. In an action to recover personal property, or its value, where it appears that the property came lawfully into the possession of the defendant a demand and refusal to deliver must be shown: Bacon v. Robson, 53 Cal. 399. If the original possession of property is acquired by tort, no demand previous to the institution of a suit is necessary: Sargent v. Sturm, 23 Cal. 359, 83 Am. Dec. 118; Wellman v. English, 38 Cal. 583.

Defendant Connolly, as the lessee of the premises or lot of land upon which the mill and machinery were erected, was lawfully in possession. He and his copartner caused the machinery to be placed in the buildings, and owned and possessed it until, by the sale under execution and failure to redeem, the title passed by sheriff's deed to the plaintiffs. If the machinery was not attached to the realty so as to pass by a sale of such realty, plaintiffs acquired no right to it, for they sold the interest of defendants as real estate and not as personal property. Treating it, then, as real property, the plaintiffs were entitled, upon presentation of their sheriff's deed, to be let into possession. Until they did so, the defendant might lawfully remain in the enjoyment of the property. They never demanded delivery or possession, and defendant, being thus lawfully in possession, was not guilty of

the unlawful detention necessary to support an action, until by demand and refusal his detention became wrongful. It follows from this view of the case that plaintiffs were not in a position at the date of suit brought to maintain an action, and the judgment and order in favor of defendant should be affirmed.

We concur: Belcher, C. C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

PEOPLE v. PHILLIPS.*

No. 20,124; January 22, 1886.

9 Pac. 312.

Forgery—Evidence of Damage.—In a Prosecution for Forgery for having feloniously issued and passed to one E. a counterfeit writing as a genuine promissory note of one F., with intent to damage and defraud said E., it is not error to admit evidence of the fact that by reason of the passing of the paper E. was damaged by being induced to make a journey, and to go to expense therefor.

APPEAL from Superior Court, County of Napa.

Coghlan & Coombs for appellant; E. C. Marshall for respondent.

MYRICK, J.—The information in this case accused the defendant of the crime of forgery, in having feloniously, willfully, and unlawfully uttered, published, and passed to one Elgin a counterfeit paper in writing as a genuine promissory note of one Fitch, with the intent to prejudice, defraud, and damage the said Elgin. Elgin, as the agent of Fitch, was endeavoring to collect from Phillips a debt due Fitch of fifty-five dollars and fifty cents. In so far as Phillips attempted to pass, and did pass, the paper in payment of that

*For subsequent opinion in bank, see People v. Phillips, 70 Cal. 61, 11 Pac. 493.

debt, the evidence would not have justified a conviction, because the information charged the act to have been committed with intent to defraud Elgin instead of Fitch. But there is evidence that in consequence of the passing of the paper, Elgin in person was prejudiced, defrauded, and damaged, viz., by his being induced to make the trip from St. Helena to Napa, and pay the expense of recording the mortgage. The making of that trip, and the payment of that expense, were parts of the one transaction, viz., imposing upon Elgin by the uttering of the false paper; and the court committed no error in admitting proof of those facts. No error appears in the record. Judgment and order affirmed.

We concur: Morrison, C. J.; Sharpstein, J.

BROWN v. GRIFFITH.

No. 9974; January 26, 1886.

9 Pac. 425.

Witnesses—Credibility—Weight of Testimony.—An Instruction to the Jury that, "if you believe any witness has sworn falsely as to any material fact, you must disbelieve such false statement, and may disbelieve the whole of his or her testimony," is good as far as it goes, and a refusal of it is erroneous; but an instruction that, "if you believe that any witness has willfully testified falsely in regard to any fact material to the issue, you are at liberty to disregard or entirely discard any part of the testimony of such witness," is erroneous, as it is not in accord with section 2061 of the California Code of Civil Procedure, which provides that "a witness false in one part of his testimony is to be distrusted in others."

APPEAL from Superior Court, County of Fresno.

Wharton & Shaw and J. R. Webb for appellants; W. D. Tupper and Sayle & Harris for respondents.

ROSS, J.—Counsel for defendants requested the court below to give this instruction to the jury: "If you believe any

witness has sworn falsely as to any material fact, you must disbelieve such false statement, and may disbelieve the whole of his or her testimony."

The court refused to give the instruction, but instead gave this: "If you believe that any witness who has testified in this case has willfully testified falsely in regard to any fact material to the issue, you are at liberty to disregard and entirely discard any part of the whole testimony of such witness in coming to your verdict."

To the action of the court in each particular defendants excepted.

The instruction the defendants requested was good as far as it went, but it was not as favorable to them as it might have been made. It cannot admit of doubt that if a witness has sworn falsely as to any material fact, such false statement should be rejected by the jury. By section 2061 of the Code of Civil Procedure it is provided "that a witness false in one part of his testimony is to be distrusted in others." As was said by this court in White v. Disher, 67 Cal. 402, 7 Pac. 826: "Here the law provides that a witness willfully false in one part of his testimony is to be distrusted; not that the jury may or may not distrust his testimony, but they are to be told that, as matter of law, his testimony is to be distrusted. This distrust forms the basis or standpoint from which they must view his testimony—the standard by which to weigh his utterances. It is true that notwithstanding this legal distrust which the law casts upon a witness willfully false in a material part of his testimony, the jury may believe him upon other points—they are to be the sole judges as to that. There may be abundant reasons why they not only may, but why they should, believe him in other particulars. The truth is not to be rejected because it passes through a false medium, but as to the existence of the truth the jury is the sole judge."

The action of the court below in relation to the instructions in question was not in accord with these views.

Judgment and order reversed and cause remanded for a new trial.

We concur: McKee, J.; McKinstry, J.

BROWN v. MANN.*

No. 9043; January 27, 1886.

9 Pac. 545.

Appeal—Defendant Administrator—Felony.—The fact that one of the defendants in whose favor a judgment was rendered in an action in which he was sued as administrator was convicted of embezzlement is not cause for dismissing an appeal, as in such case the administrator does not become civiliter mortuus, so that no notice of appeal could be served on him or his attorney.

Pleading—Supplemental Complaint—Statute of Limitations.—Where a supplemental complaint filed in 1879 sets forth a cause of action founded upon a verbal loan for one year, made in 1869, and secured by a deed, such action is barred by the statute of limitations.

Trial.—Findings Reviewed and Held to Cover All the Issues made by the pleadings, and to be sufficient.

APPEAL from Superior Court, County of Santa Cruz.

W. D. Story for appellant; C. B. Younger, J. A. Barham, F. Adams and A. Craig for respondents.

FOOTE, C.—The motion to dismiss the appeal herein is not well taken, and should be denied. It is made for the reason, as alleged, that one of the defendants, in whose favor a judgment was rendered in the trial court, was convicted of embezzlement, and, while acting as administrator, became civiliter mortuus, and that, being sued as such, no service of notice of appeal could be made on him or his attorney. No question of this kind was raised in any of the proceedings in this cause until judgment was had in favor of the defendant Otts, administrator, and his codefendants, and it is now raised for the first time to prevent this appeal from being heard.

We are of opinion that the reasoning of this court in the case of Estate of Nerac, 35 Cal. 396, 95 Am. Dec. 111, applies here, and said administrator, not being sentenced for life as a convict, his responsibilities to those having claims against him did not cease, although certain of his rights were for a time suspended. His letters as administrator were never revoked by the action

*For subsequent opinion, see 68 Cal. 517, 9 Pac. 549.

of the court, to which he was subject as such officer. He litigated with the plaintiff at every stage of the cause up to and including the rendition of the judgment in his favor, and only raises the point of his disability when an appeal is prayed for aimed at the reversal of that judgment. To allow his contention now to prevail would be manifestly unjust.

Leaving out of view for the present all other questions in the case, it becomes pertinent to determine if the plaintiff is entitled upon the findings to recover against any of the defendants, in view of the interposition of the plea of the statute of limitations. In his supplemental complaint he counts upon a cause of action which is upon a verbal loan for one year, made in 1869, and secured by a deed. This was not the same cause of action which was counted upon in the first complaint; that was upon a note secured by a mortgage of date the 4th of May, 1870. The supplemental complaint was not filed until the 12th of September, 1879, more than eight years after the note became due, and nine years after the debt of 1869 became due. As against all of the defendants, therefore, the action was barred by the statute of limitations when the supplemental complaint containing the new cause of action, the debt of 1869, was filed: Anderson v. Mayers, 50 Cal. 525.

It is claimed, however, that the court did not find upon all the material issues made by the pleadings. The finding upon the question as to whether the note was paid or not is, we think, though not very full, sufficient. There was no necessity to find whether or not the deed from T. W. and M. J. Mann to Abel Mann was without consideration, etc., for the reason that there was a finding showing such deed to have been null and void, and that the mortgage on which the action was based was made prior to that deed, and plaintiff could not have been injured thereby under section 3441 of the Civil Code.

It appears from the findings, taken as a whole, that the court determined the claims of defendants to the property therein described were not subject to the lien of plaintiff's mortgage, and the issue thus made was sufficiently passed upon. The findings are sufficient also as to the bar of the statute of limitations. Nor is the objection made as to finding 9, viz., that it was surplusage, tenable.

We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

We concur: Searls, C.; Belcher, C. C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

COHEN v. MITCHELL and Others.

No. 9357; January 27, 1886.

9 Pac. 649.

Appeal.—Where There is a Conflict in the Evidence, the judgment will not be reversed on the ground that the findings are not supported by the evidence.

Adverse Possession.—Findings Reviewed, and Held not Supported by the evidence.[1]

APPEAL from Superior Court, County of Calaveras.

Lloyd & Wood for appellant; E. A. Rogers, John A. Wright and McAllister & Bergin for respondents.

BELCHER, C. C.—On the eleventh day of November, 1873, Cohen owned one-third and Mitchell two-thirds of the Bonny placer mine. Cohen had become indebted to Mitchell in the sum of five thousand dollars, and on that day, for the expressed consideration of that sum of money, conveyed to him his one-third interest by a deed absolute in form. The deed was intended to be only a mortgage, as is clearly shown by the paper executed by Mitchell on the 24th of January, 1874, wherein he declares that he holds the title to the undivided third of the mine in trust for Cohen, and agrees to reconvey

[1] **Cited** and followed in Warder v. Enslen, 73 Cal. 295, 14 Pac. 876, where, in the case of a deed, in form absolute, intended as a mortgage, it was held that the grantee's possession must be adverse for five years after breach of condition in order to bar the grantor from his action to redeem.

it to him upon payment of his indebtedness of five thousand dollars, with interest thereon from the eleventh day of November, 1873, until paid, at the rate of one per cent per month, the payment to be made upon demand; and, if not so made, that judgment should be obtained for the amount found due, and three per cent counsel fees, with costs of suit for foreclosure, should be included in the judgment. Upon this paper Mitchell made an indorsement, some time in the summer of 1875, as follows: "I hereby agree to extend the within document for one year, or till the claim is sold." Mitchell died on the eighth day of February, 1882, no reconveyance having been made to Cohen, and this action was commenced on the eighteenth day of April, 1882. In the complaint it is alleged that after the conveyance of November 11, 1873, Mitchell held the legal title to the one-third interest in the mine, in trust for the plaintiff, and was to reconvey it to the plaintiff upon payment by him to Mitchell of the sum of five thousand dollars, with interest thereon at the rate of one per cent per month; that he (plaintiff) had before Mitchell's death paid to him the full amount of the five thousand dollars and interest, and was entitled to a reconveyance, but by his consent Mitchell continued to hold the legal title in trust for him, and so held it at the time of his death. The prayer is for a judgment that plaintiff is the owner of a one-third interest in the mine, and that the defendants be required to execute to him a good and sufficient deed therefor. The defendants, by their answer, deny that any part of the five thousand dollars, or the interest thereon, was ever paid by Cohen to Mitchell, and they allege that his cause of action is barred by the provisions of section 346 of the Code of Civil Procedure. The court below found that no part of the debt had ever been paid, and that since the 11th of July, 1876, and until the eighth day of February, 1882, Mitchell had been in the sole and exclusive possession and ownership of the Bonny mine, holding and claiming the same during all that time adversely to Cohen.

1. There was testimony tending to show that the debt had not been paid, and we cannot reverse the judgment upon the ground that the finding upon this question was not justified by the evidence.

2. Section 346 of the Code of Civil Procedure reads as follows:

"An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after the breach of some condition of the mortgage."

After carefully reading all the testimony presented in the transcript, we are unable to find anything to justify the finding that Mitchell continuously maintained an adverse possession of the mortgaged premises for five years before his death. Mitchell was at the mine in Calaveras county, managing and working it, and Cohen was in San Francisco. From 1875 to 1880 frequent correspondence was kept up between them in reference to the working of the mine, cleaning up the gold, procuring and paying for supplies, trying to find a purchaser, etc. In none of the letters do we see any evidence of an adverse holding by Mitchell, but, on the contrary, the most intimate and friendly relations seem to have been maintained between them. In July, 1876, Mitchell wrote to Cohen, and, speaking of getting pipe needed in the mine said: "Now I leave it to you whether we get Smith or Wing to make it. The sooner we get it the better." In July, 1877, Mitchell wrote, and, speaking of the sale of the mine, said: "I have received yours of the 10th, and one letter from Mr. Eells. He says he has made sale, and getting his business fixed as fast as he can; and I think we should give him a little time, as it would ruin him for us to make other arrangements. I would take pleasure in showing anyone our claim, but could not go into arrangements with anyone else for a little while."

In December, 1877, Mitchell wrote, and after saying that he had not heard a word from Eells for a long time, and he supposed he had failed in his undertaking, he said: "We will have to raise some money on the claim, or some other way, for I must have some to work with, for I cannot afford to wait any longer to make sale of the claim. So please think about it, so as we get at the best plan to get it."

In March, 1878, he wrote: "I heard from Mr. Eells about a week ago, and he said he had his company formed, and I expect to see him soon, or hear from him again."

In February, 1880, he wrote: "Mr. Kline has been here, and I showed to him the claim, and he has returned, and I expect you have seen him and found out what he thinks of it, and what he expects to do."

On the twenty-second day of August, 1877, Mitchell and Cohen signed a paper, in which they recited that on the eighth day of February, 1877, they had agreed in writing to sell and convey unto John S. Eells, upon certain terms and conditions, the Bowling Green and Bonny mining claims, and had extended the time for the performance of the terms of the agreement until the first day of November, 1877, and then agreed if the sale should be effected to pay back to Eells a large percentage of the purchase money.

Mrs. Mitchell was called as a witness for the defendants, and testified that in December, 1876, she heard her husband say to Cohen, at Vallecito: "I want you to pay me the five thousand dollars, and interest you owe me, when we get cleared up." And again, in January, 1877, she heard them talking in San Francisco, and Mitchell said to Cohen: "I want you to pay me the five thousand dollars and interest you owe me." Kline, a witness called for defendants, testified that "on the second day of November, 1881, or the next day afterward, and when Mitchell had secured the conveyance of the claim from the Bonny Mining Company, he said to Cohen, in my presence: 'I have got it back, and I now demand pay for the last time.'" It is clear that this evidence—and we see nothing in conflict with it—is wholly inconsistent with any theory that Mitchell was holding the possession of Cohen's one-third of the mine adversely to him. It follows that the judgment and order should be reversed and the cause remanded for a new trial.

We concur: Searls, C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

HARTER v. DONAHOE.

No. 11,138; January 29, 1886.

9 Pac. 651.

Sales—Immediate Delivery and Change of Possession.—Where a sale is not accompanied by an immediate delivery and continued change of possession, it is void as against the vendor's creditors.

APPEAL from Superior Court, County of Fresno.

Grady & Merriam for appellant; Sayle & Harris for respondent.

By the COURT.—The evidence showed that there was no such immediate delivery and continued change of possession of the property in question as required by statute to make valid the transfer to plaintiff: Civ. Code, sec. 3440.

Judgment and order reversed and cause remanded for a new trial.

HEILBRON v. LAST CHANCE W. D. CO.

No. 11,140; January 29, 1886.

9 Pac. 456.

Nonsuit.—Where the Evidence Given on a Trial Tends to Sustain the allegations of the complaint concerning the acts complained of, it is error to grant a nonsuit.

Injunction—Evidence.—In an Action to Restrain Certain Acts of a Corporation arising from constructing a dam, where an officer of the corporation was asked on the trial: "Unless there is an injunction issued in this case forbidding the corporation, through its agents, from doing this act, you, as long as you are agent of the corporation, will continue to do it when you think it necessary to do it, and to the advantage of the corporation"—the refusal of the court to allow such question is error.

APPEAL from Superior Court, County of Tulare.

Brown & Daggett and D. S. Terry for appellant; Atwell & Bradley for respondent.

MYRICK, J.—The evidence given on the trial tended to show that officers and agents of the defendant were engaged in constructing a dam for the defendant, and in such construction committed some of the acts complained of. That being the case, the court erred in granting a nonsuit. The court sustained an objection to the following question propounded to one of the officers:

"Question. And unless there is an injunction issued in this case forbidding the corporation, through its agents, from doing this act, you, as long as you are agent of the corporation, will continue to do it when you think it necessary to do it, and to the advantage of the corporation?"

The ruling was error.

Judgment reversed and cause remanded for a new trial.

We concur: Morrison, C. J.; Thornton, J.

CRAIG v. ALLEN and Others.

No. 11,196; January 30, 1886.

9 Pac. 429.

New Trial—Presumption in Favor of Order Granting.—Where a new trial is ordered by a court, every intendment is in favor of the order, and the legal presumption is that it was made on the ground of insufficiency of the evidence to justify the decision; and, in the absence of all proof of abuse of discretion in the trial judge, such order is not reversible.

APPEAL from Superior Court, County of Los Angeles.

J. H. Howard and J. R. Scott for appellant; Bicknell & White and Graves & Chapman for respondents.

By the COURT.—Appeal from an order granting a new trial. The judgment rendered in the case was founded upon

an elaborate finding of facts. One of the grounds of the motion to vacate the judgment and grant a new trial was "insufficiency of the evidence to justify the findings and decision of the court, and that the judgment and decision were against law." The court ordered a new trial without stating any grounds, but, as every intendment is in favor of the order, the legal presumption is that it was made on the ground of the insufficiency of the evidence to justify the decision. That being so, the order granting a new trial, in the absence of all proof of an abuse of discretion in the trial judge, is not reversible. Order affirmed.

SANKEY v. SOCIETY OF CALIFORNIA PIONEERS.

No. 11,430; February 2, 1886.

9 Pac. 424.

Mandamus—Application to Superior Court in First Instance.—Application for mandamus denied on the ground that the petition fails to state sufficient reasons for not applying to the superior court in the first instance.

Application for mandamus.

The petition fails to state any special reason for not applying to the superior court in the first instance, other than a saving of time, for the reason that, whatever the decision, an appeal would be taken to the supreme court. Rule 28 of the supreme court, on which the decision is based, is as follows:

"In any application made to the court for a writ of mandamus, ... for which an application might have been lawfully made to some other court in the first instance, the affidavit or petition shall, in addition to the necessary matter requisite by the rules of law to support the application, also set forth the circumstances which, in the opinion of the applicant, render it proper that the writ should issue originally from this court, and not from such other court. The sufficiency or insufficiency of such circumstances so set forth in

that behalf will be determined by the court in awarding or refusing the application."

Samuel Sankey for petitioners.

By the COURT.—The application for a writ of mandamus is denied upon the ground that the petition fails to state sufficient reasons for not applying to the superior court in the first instance: Rule 28 of the supreme court.

GATES v. McLEAN.*

No. 9926; February 19, 1886.

9 Pac. 938.

Ejectment—Sufficiency of Complaint.—Where a complaint in an action of ejectment brought by a vendor against a vendee avers ownership of the property in the plaintiff, the making of a contract for the sale thereof to defendant, the payment of a part of the contract price by defendant, his entry into possession, the tender of a deed, demand and refusal of payment, notice of rescission of contract by plaintiff, tender to the defendant of the money paid, with interest, and demand of possession, which was refused, it is sufficient.

Vendor's Remedy When Vendee Refuses to Perform.—Where a vendor of real estate has kept all his covenants in a contract of sale, and the vendee refuses to perform his part, the vendor may rescind the contract or sue for specific performance.

Judgment of Nonsuit—Admission as Evidence.—A judgment of nonsuit is not final, and determines nothing, and the admission of such a judgment as evidence to establish title to land is error.

APPEAL from Superior Court, County of Stanislaus.

William L. Dudley, William O. Minor, L. J. Maddux and Wright & Hazen for appellant; W. E. Turner for respondent.

SEARLS, C.—This is an action of ejectment to recover certain lots of land in the town of Modesto. Plaintiff had

*For subsequent opinion in bank, see Gates v. McLean, 70 Cal. 46, 11 Pac. 489.

judgment, from which, and from an order denying a new trial, defendant appeals. The demurrer to the complaint was properly overruled. The pleading demurred to avers ownership of the property in plaintiff, the making of a contract for the sale thereof to defendant, payment of three hundred dollars on account of the purchase price by defendant, his entry into possession, tender of a deed, demand of payment, and refusal to pay, rescission of the contract by plaintiff, notice thereof and tender to defendant of the money paid, with interest, and demand of possession, which was refused. If the allegations of the complaint are true, plaintiff on his part had kept and performed all the covenants of the agreement to sell, by him to be kept and performed, and defendant had refused to pay the balance of the purchase price. This would entitle plaintiff to a specific performance of the contract, or to a rescission of the agreement and recovery in ejectment.

On the fifteenth day of August, 1881, plaintiff executed and delivered to defendant an agreement in the following language:

"AN AGREEMENT BETWEEN SAMUEL GATES AND SAMUEL M. MCLEAN.

"The said Gates sells and binds himself to give a good and sufficient deed and possession to Samuel M. McLean of the five lots known as the Walden property, on which is the Walden house and the Barney Garner house, being on the corner of Jay and Eleventh streets, opposite J. D. Spencer's, for the sum of two thousand eight hundred dollars, so to be paid as follows: Two hundred dollars cash in hand, one thousand two hundred dollars in thirty days, and the remainder, one thousand four hundred dollars, in sixty days, and interest on the two thousand six hundred dollars as soon as McLean is placed in possession of the property.

"Fifteenth of August, 1881.

"It is agreed and understood that if Samuel Gates cannot give a deed to the above property, on account of any legal inability, there shall be no damages charged or received.

[Signed] "S. GATES."

On or about October 8, 1881, McLean paid Gates three hundred dollars on account of the purchase price of the lots, and received the following receipt:

"Received of S. M. McLean the sum of three hundred dollars, part payment of the purchase price of lots Nos. twelve, (12,) thirteen, (13,) fourteen, (14,) fifteen, (15,) and sixteen, (16,) in block No. sixty-eight, (68,) in the town of Modesto, county of Stanislaus; and I hereby agree to make, execute, and deliver to the said McLean a good and sufficient title to the above lots, free from all incumbrances, save and except the present tax liens, upon payment to me of the further sum of two thousand five hundred dollars, with one per cent. per month interest from date until paid.

"SAMUEL GATES.

"Dated Modesto, October 8, 1881."

Thereupon McLean entered into, and ever since has retained, possession of the demanded premises.

At the time the contract of sale was entered into it was well understood that one Brusie claimed title to the premises adverse to plaintiff, under and by virtue of a sheriff's deed executed pursuant to a sale under execution issued upon a judgment rendered in a justice's court against one Minor Walden, the grantor of plaintiff. Brusie subsequently instituted an action against the tenants of McLean to recover possession of the property, in which action plaintiff Gates intervened, and, upon a trial, Brusie suffered judgment of nonsuit. Plaintiff, as appears from the evidence, tendered a deed of the premises and demanded payment of the purchase money; which being refused for alleged defect in plaintiff's title, he thereupon gave notice of a rescission of the contract of sale, offered to repay the three hundred dollars received on account of the purchase, with interest, and demanded possession, which being refused, this action was instituted.

The question which at the trial dominated all others was as to the validity of the title which plaintiff offered to convey. The contention of defendant was that there was an outstanding title in Brusie, which under the contract plaintiff was bound to extinguish or secure before he could convey in accordance with his contract. For the purpose of proving the invalidity of the Brusie title, plaintiff was permitted, under objection, to introduce the judgment-roll in Brusie

against the tenants of defendant, hereinbefore mentioned, in which a nonsuit was entered, and this action of the court is assigned as error. A judgment of nonsuit determines nothing, except the right of plaintiff to proceed in the present action. It has been said a nonsuit "is but like the blowing out of a candle, which a man at his own pleasure may light again." Under no circumstances will such a judgment be deemed final, whether entered before or at the trial: Freeman on Judgments, sec. 261; Clapp v. Thomas, 5 Allen (Mass.), 158. It follows that the admission of the judgment-roll was error.

Appellant suffered no injury from the admission of the deeds from the Central Pacific Railroad Company to the Contract & Finance Company, and from the latter to Minor Walden. The title to the lots in question is averred by the answer to have been in Walden, hence it was unnecessary to introduce the conveyances, but doing so could not harm defendant.

For the error indicated we are of opinion the judgment and order should be reversed and a new trial granted.

Foote, C., and Belcher, C. C., concurred.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded for a new trial.

McKAY v. JOY, Administrator, etc.*

No. 9719; February 19, 1886.

9 Pac. 940.

Partnership—Right of Surviving Partner.—Under section 1585, Code of Civil Procedure, where a partnership is dissolved by the death of one of the partners, the surviving partner is entitled to all the assets of the firm and to settle up the business.

Administration—Claim of Surviving Partner must be Presented. Where all the assets have been taken possession of by the adminis-

*For subsequent opinion in bank, see McKay v. Joy, 70 Cal. 581, 11 Pac. 832.

trator of a deceased partner, under section 1493 of the Code of Civil Procedure, the surviving partner cannot bring suit against such administrator for his interest in such assets without first presenting his claim to such administrator.

APPEAL from Superior Court, County of Amador.

A. C. Brown for appellant; Eagon & Armstrong for respondent.

BELCHER, C. C.—Plaintiff and Jarius A. Joy were partners in the business of farming. In January, 1883, Joy died, and on the first day of February the defendant was appointed administrator of his estate. It is alleged in the complaint that at the time of his death there was personal property belonging to the partnership of the value of nearly five hundred dollars, and that the partnership was indebted to the plaintiff for money paid, laid out, and expended for boarding Joy and the hands on the ranch, and for the services of Mrs. McKay in cooking, washing, etc., in a sum exceeding one thousand dollars. It is also alleged that the claim on which this action is brought was duly presented to the defendant, as administrator, for allowance, on the thirtieth day of April, 1883, and was by him rejected on the first day of May, 1883. It appears from the bill of exceptions that in February, 1883, all of such personal property was taken from the possession of the plaintiff and delivered to the defendant by the sheriff, under a writ of replevin, but it does not appear by whom or why the action of replevin was commenced, or what became of it.

This action was commenced in November, 1883, and the prayer of the complaint is that an accounting be taken of all the said copartnership dealings and transactions from the commencement thereof, and of the money and of the effects received and paid by the plaintiff and the said Jarius A. Joy, respectively, in relation thereto; that the property of the firm be divided between the plaintiff and the estate of the said Joy, according to their respective interests; that the defendant, as administrator, be adjudged to pay the plaintiff the amount which shall appear or be found to be due him after the accounting and full settlement of said partnership

business; and for such other and further relief as may be just, with costs of this action.

When the case was on trial it was admitted by the plaintiff and his counsel in open court that his present cause of action was based upon a claim which had never been presented to the defendant as administrator for allowance. Thereupon counsel for defendant moved the court for a nonsuit and dismissal of the action upon the ground that the claim was one which must be presented for allowance and rejected before any action could be maintained upon it. The court granted the motion, and the appeal is from the judgment of nonsuit.

There was only one question presented by the appeal, and that is whether the plaintiff could maintain his action without first presenting his claim to the administrator for allowance. As surviving partner the plaintiff had the right to continue in possession of all the property of the partnership, settle its business, pay its debts out of the assets if sufficient, and wind up its affairs: Code Civ. Proc., sec. 1585. If before this was accomplished an action was commenced to take from him the possession of the property, he could have made a successful defense to it, and thus have maintained his rights; and if, without action, the property was tortiously taken from him, he could have recovered it back.

Here the action is not for a tortious taking of the property, but for an accounting; and the plaintiff claims that when that accounting is had a balance will be found due him, for which he asks judgment. It is just such an action as is usually resorted to where one partner seeks to have the affairs of the partnership settled up, after its dissolution, and the assets are all in the hands of the defendant. It is based upon a claim made against the estate of the decedent, which may be contingent and uncertain in amount, but clearly arises upon contract.

Section 1493 of the Code of Civil Procedure provides: "All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever."

And section 1500 of the same code provides: "No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or

administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint."

It is urged by counsel for appellant that the claim of the plaintiff has never been in condition to be presented to the administrator for allowance, there being no definite or ascertained amount to present, and that there can be none until the settlement of the partnership accounts and effects for which this suit is brought; and he cites Gleason v. White, 34 Cal. 258, in support of his position that the claim of a surviving partner should not and cannot be presented until the partnership affairs are wound up.

By turning to the case cited, it will be seen that the law at that time provided "If a claim be not presented within ten months after the first publication of notice, it shall be barred forever: provided, if it be not then due, or if it be contingent, it may be presented within ten months after it shall become due or absolute."

The court said: "The surviving partner's claim is contingent, within the meaning of section 130 of the probate act, until the partnership affairs are settled and the claim becomes absolute."

The claim was not presented within ten months after the first publication of notice, but it was afterward presented, and the court held it to be in time. Since that case was before the court the law has been changed so as to require all claims, whether due or not due, or contingent, to be presented within the time limited in the notice. The difficulties of presenting a contingent claim are met by the code, which requires only that "the particulars of such claim must be stated": Code Civ. Proc., sec. 1494. The case is not within the exception provided for in section 1500, above quoted. The action was not brought to enforce a mortgage or lien against the property of the estate.

We think the judgment should be affirmed.

Searls, C., and Foote, C., concurred.

By the COURT.—For the reasons given in the foregoing opinion the judgment is affirmed.

CHIELOVICH v. KRAUSS and Others.*

No. 11,007; February 19, 1886.

9 Pac. 945.

Quieting Title—Title Founded on Fraudulent Judgment.—Where in an action to quiet title to land it appears that the title of plaintiff is derived through a fraudulent judgment, it must be made to appear that the parties defrauded, where they had notice of such fraudulent judgment, took proper steps to avoid the consequence of such judgment by filing a motion under section 473, Code of Civil Procedure, to have the fraudulent judgment set aside.

Trial—Rule of Court—When Set Aside.—A rule of the trial court established for the promotion of justice may, in the discretion of the court, and to meet the ends of justice, be set aside.

Mortgage—Tender After Due—Effect on Lien.—The tender of the amount due on a debt which is secured by mortgage, after due, will not release the mortgage lien.

APPEAL from Superior Court, County of Yolo.

Charles L. Quen and Ball & Craig for appellant; W. B. Treadwell and Grove L. Johnson for respondents.

FOOTE, C.—Action to quiet title by plaintiff against Krauss. Roth intervened. Demurrers were interposed to the answer and complaint in intervention, and were both overruled. Judgment was then rendered against the plaintiff, and his motion for a new trial denied. From the judgment and order he appealed. The point is made by respondents that the court erred in settling and considering the statement on motion for a new trial against their objection, and that it should not be considered on appeal. The ground of the objection urged is that the court set aside its own rules, which required, in all cases where an extension of time to prepare, serve, and file such statement was granted, that as a condition precedent to its validity the order made in the premises should be served on opposing counsel, or the party he represented, which course was not taken in this case.

A rule of that description is intended to meet the ends of justice, and a court can, in the exercise of a proper and legal

*For subsequent opinion, see 11 Pac. 781, post, p. 700.

discretion, set it aside: People v. Williams, 32 Cal. 282–289; Pickett v. Wallace, 54 Cal. 147, 148. In the absence of anything in the record to show what reason controlled the action of the court, as in this case, it is to be presumed that a proper one existed, and that tribunal acted upon it. The demurrers to the answer and complaint in intervention should have been sustained.

In both the pleadings objected to it was affirmatively pleaded that plaintiff's attorney had practiced a fraud on the defendant Roth in obtaining a judgment in an action on a promissory note, which judgment was the foundation of the title which in the present action plaintiff sought to have quieted. But nowhere was it alleged that Roth, or his attorney Treadwell, who had notice of that judgment, and opportunity for doing it, ever endeavored to have it set aside on motion, under section 473 of the Code of Civil Procedure; or that they had been prevented from so doing by any artifice, deception, or fraud on the part of plaintiff or his attorney. This course of action should have been taken, as otherwise it would appear that the party complaining of fraud, etc., had not used due and proper diligence to avoid its effect: Bibend v. Kreutz, 20 Cal. 109; Ketchum v. Crippen, 37 Cal. 223; Ede v. Hazen, 61 Cal. 360. For the same reason the evidence of Treadwell on that point was inadmissible.

There was no allegation in the answer filed in the action on the promissory note of date the 4th of April, 1878, denying its making and execution as of that date. On the contrary, it contained a positive averment that the note "was made, executed, and delivered" in the state of Nevada, and not in California. There was nothing in the answer, or the complaint in intervention, filed in the present action, which averred a date different from that shown by the note. Therefore evidence tending to show a date other than that on its face was, under the pleadings, inadmissible.

Appellant contends that a tender of the amount due on a debt, which is secured by mortgage, made after the debt falls due, releases the lien of the mortgage. This is not the law of California: Himmelmann v. Fitzpatrick, 50 Cal. 650.

The other questions raised it is unnecessary to determine; for should amendments to the pleadings be allowed and made in the court below, testimony may become pertinent which

might, perhaps, under the present issues, be inadmissible, although this we do not now decide.

The judgment and order should be reversed and cause remanded for a new trial.

Belcher, C. C., and Searls, C., concurred.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded for a new trial.

TULLY v. TULLY.*

No. 8492; February 25, 1886.

9 Pac. 841.

Tenants in Common—Adverse Possession.—A claim of an interest in land as a cotenant is of no avail as against the person having possession of the land, who has held the same adversely under a claim of title for a period of twenty years prior to the commencement of the action.

APPEAL from Superior Court, County of Santa Clara.

W. G. Lorigan and S. F. Lieb for appellant; Archer & Lovell for respondent.

FOOTE, C.—Supposing a certain piece of land to belong to the United States government, and wishing to pre-empt it, John Tully bought the possessory right thereto from, and paid the price therefor to, one Murphy. He procured the deed to be made to himself and his brother Owen without Owen's knowledge. John let Owen into possession of the land as his tenant, but not as a claimant to any part thereof. A few years after, upon demand, Owen yielded possession of the land to John, the latter claiming to be the sole owner thereof. After this, John finding that he could not pre-empt the land, either in his own or Owen's name, bought from the

*For subsequent opinion in bank, see 71 Cal. 338, 12 Pac. 246.

vendees of Chaboya, the Mexican grantee, and patentee of the United States government, and paid for it the purchase price, and continued the possession adverse to Owen he had obtained under Murphy. After the lapse of about twenty years from this last purchase Owen instituted the present action, to be let into possession by John as his cotenant of half the land, without having ever contributed a cent to purchase it, or asserted any claim thereto until about one year before the commencement of his suit. The defendant set up the plea of the statute of limitations of five years, and the provisions of section 319 of the Code of Civil Procedure, and his superior title under his deed from the Chaboya vendees, in bar of plaintiff's right to recover. It is plain that Owen never had or claimed any interest in the land other than as tenant of John, while in possession thereof. He delivered its possession to John, who was then asserting, adversely to him, a right thereto as absolute owner. John remained in such adverse possession for about twenty years before this action was instituted. Under such state of facts no cotenancy ever existed between the parties. Therefore it was competent for John to introduce in evidence the deed to himself from the Chaboya vendees. Admitting, without deciding, that section 319, Code of Civil Procedure, is not applicable to prevent a recovery in such a case, section 318, Code of Civil Procedure—the statute of limitations of five years—is pleaded in bar, and the court finds in the affirmative upon the issue it presents.

We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

We concur: Belcher, C. C.; Searls, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

ROSS v. BRUSIE.*

No. 9965; February 26, 1886.

10 Pac. 121.

Mortgage—Deed Absolute—Evidence—Book Accounts.—In proceedings for redemption from a mortgage, where the question at issue is whether a deed absolute in form with an agreement for reconveyance was intended as a mortgage or not, a book of account cannot be introduced in evidence to show that defendant credited plaintiff with the alleged purchase price of the lot in controversy.

APPEAL from Superior Court, County of Stanislaus.

L. J. Maddux and Wright & Hazen for appellant; W. E. Turner for respondent.

SEARLS, C.—This is an action to redeem a lot of land in the town of Modesto. A deed, absolute in form and purporting to be in consideration of two hundred and fifty dollars was executed and delivered by plaintiff to the defendant. The latter at the same time delivered to the former a bond, by which he bound himself to convey to the former, at any time within two years, the same property upon the payment to him of two hundred and fifty dollars. Plaintiff failed within the two years to tender the sum mentioned in the bond, but subsequently did make such tender, and demanded a deed from defendant, which was refused. The question for determination in the court below was whether the transactions, taken together, constituted a mortgage. It was held that they did not. The finding is that the deed was not given as security, but was executed and delivered by plaintiff to defendant in pursuance of a sale of the property in question. There is testimony in support of the facts as found by the court, and the conclusions of law and judgment are in consonance with the facts. At the trial, defendant was permitted to introduce in evidence, against the objection of plaintiff, his book of account for the purpose of showing that he credited plaintiff with two hundred and fifty dollars, the alleged purchase price of the lot of land concerning which

*For subsequent opinion in bank, see 70 Cal. 465, 11 Pac. 760.

the controversy arose. The entries made by a party in his books of account are admissible in his own favor under certain limitations and for certain specific purposes: 1 Greenleaf on Evidence, sec. 118. This, however, is an exception to a general rule which holds that a party cannot make evidence in his own favor. The proffered evidence was not properly within any exception to be found in the reported cases, and should have been excluded. For this error the judgment and order appealed from should be reversed, and a new trial ordered.

We concur: Belcher, C. C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded for a new trial.

In re TAYLOR.

No. 20,135; February 27, 1886.

10 Pac. 88.

Contempt.—Order to Show Cause Discharged and proceedings dismissed.[1]

Proceedings against respondent for alleged contempt of court.

The Attorney General for the prosecution; Preston & McPike and D. H. Regensburger for the defense.

By the COURT.—This cause is ruled by the decision in the case entitled "In re Buckley, 69 Cal. 1, 10 Pac. 88, charged with contempt," and therefore it is ordered that the order

[1] **Cited** and approved in Sawyer v. Hutchinson, 149 Iowa, 94, 127 N. W. 1090, where it is said a contempt proceeding is in its nature quasi criminal, requiring, therefore, a greater weight of evidence than a civil case, and that a strong showing should be made against a person before punishing him for violating an injunctional decree.

to show cause herein be discharged and the proceedings dismissed.

We dissent: Ross J.; McKinstry, J.; McKee, J.

CHILDS v. EDMUNDS, Judge, etc.

No. 11,498; March 9, 1886.

10 Pac. 130.

Prohibition.—The Enforcement of a Writ of Assistance, as against one not a party to the action, cannot be restrained by a writ of prohibition, as there is in such case an adequate remedy at law by appeal from the order granting the writ.[1]

Application for writ of prohibition to restrain the enforcement of a writ of assistance, obtained against petitioner for the purpose of dispossessing him, in a foreclosure suit to which he was not a party.

E. A. & G. E. Lawrence for petitioner; J. R. Brandon for respondent.

By the COURT.—The application for a writ of prohibition in this case is denied for the reason that petitioner has an adequate remedy by appeal from the order complained of.

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[1] **Cited** and approved in Havemeyer v. Superior Court, 84 Cal. 398, 24 Pac. 139, where it is explained as a case in which the petitioner had a right to appeal and by his appeal could stay the enforcement of the writ of assistance; and is distinguished from a case where an appeal would furnish no remedy for the wrong threatened, as was the case then under consideration.

Cited in a note in 111 Am. St. Rep. 953, on the writ of prohibition.

HOLMBERG v. HENDY.

No. 9131; March 31, 1886.

10 Pac. 394.

Replevin—Form of Verdict and Judgment.—In an action of claim and delivery, the verdict and judgment must be in the alternative, as provided by section 667 of the California Code of Civil Procedure.

APPEAL from Superior Court, Calaveras County.

Action for claim and delivery. The verdict and judgment were not in the alternative form, but merely for plaintiff for the sum of eleven hundred dollars and interest.

William H. H. Hart for appellant; Ira H. Reed for respondent.

ROSS, J.—The action is claim and delivery. The judgment does not conform to the requirements of the statute in such cases, for which reason it must be reversed: Code Civ. Proc., sec. 667; Berson v. Nunan, 63 Cal. 550. The verdict contains the same vice, for which reason a proper judgment could not be here ordered, assuming that none of the other points made by appellants are well taken. A new trial must therefore be ordered without reference to the other points.

Judgment and order reversed and cause remanded for a new trial.

We concur: Myrick, J.; McKinstry, J.

SANTA CRUZ GAP TURNPIKE JOINT STOCK CO. v. BOARD OF SUPERVISORS OF SANTA CLARA.

No. 9235; April 2, 1886.

10 Pac. 404.

Toll-road—Mandamus—Demurrer to Petition.—Where an application is made to a superior court for a writ of mandate to compel the board of supervisors of a county to locate toll-gates and to fix rates of toll on a certain road which it is claimed in the petition the corporation petitioner had a right to collect tolls upon, the superior

court is in error if it sustains a demurrer to such petition on the ground that it does not appear therefrom that the petitioner had or owned any road, or right of way for a road, as such a petition states, sufficient to entitle the petitioner to relief.

Application for a writ of mandate.

S. O. Houghton for appellant; J. H. Campbell and S. F. Leib for respondent.

By the COURT.—This was an application to the superior court of the county of Santa Clara for a writ of mandate to compel the board of supervisors of that county to locate toll-gates and to fix rates of toll on a certain road which it was claimed the corporation petitioner had a right to collect tolls upon. An order was made requiring the respondent to show cause why the writ should not issue. The respondent moved to quash the petition upon the ground that it did not appear that the petitioner had or owned any road or right of way for a road. The court treated the motion as a demurrer and sustained it, and the petitioner declining to amend, judgment was entered denying the application. We think the court erred in its ruling. Looking at the whole petition we think it states all the facts necessary to entitle the petitioner to the relief demanded. The judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrer.

FREDERICKS v. JUDAH.*

No. 9100; May 18, 1886.

11 Pac. 133.

Deceased Witness—Admissibility of Testimony in Another Action.—In an action to quiet title, the testimony of a witness, taken in a former action between the same parties, and concerning the title to the same land, is admissible, if such witness has since died.[1]

*For subsequent opinion in bank, see 73 Cal. 604, 15 Pac. 305.

[1] **Cited** and followed in Persons v. Smith, 12 N. D. 417 (Persons v. Persons, 97 N. W. 556), where the testimony of the deceased had been taken in a case, between the same parties and involving the same issues, in a United States court in a neighboring state.

APPEAL from Superior Court, City and County of San Francisco.

P. B. Ladd and Wilson & Otis for appellant; William H. Sharp for respondent.

ROSS, J.—Several of the questions argued by counsel cannot be considered because of the state of the record. The affidavits printed in it are in no manner identified as having been used on the hearing of the motion from the refusal of which the appeal is alone taken. There is no appeal from the judgment. Order 733, referred to in the statement, and therein stated to be made a part of it, is not to be found at all.

The action was brought to quiet the plaintiff's alleged title to a certain lot of land in the city and county of San Francisco, the complaint being in the usual form of such actions. The answer of the defendants, who are the heirs at law of one Ferguson, deceased, denied any title on the part of plaintiff, pleaded title in themselves derived through Ferguson; and, among other things, set up that plaintiff went into possession of the lot as the tenant of Ferguson, and has ever since continued to hold as such, although the term of the lease has long expired. The answer further pleaded in bar a judgment of the county court of the city and county of San Francisco, rendered in an action of unlawful detainer brought by the defendant Maria B. Judah, as executrix of the estate of Ferguson, against the present plaintiff, for the restitution of the possession of the lot, etc. On the trial of that action one Dean was examined as a witness on behalf of the plaintiff therein, and cross-examined by the defendant therein (plaintiff here), who gave material testimony bearing upon the question as to whether the entry upon the holding of the lot in controversy by Fredericks was as the tenant of Ferguson or not. Dean was dead at the time of the trial of the present action, and the defendants herein, against the objection and exception of the plaintiff, were permitted to give in evidence the reporter's notes of Dean's testimony. This action on the part of the court, it is contended by plaintiff, was error, entitling him to a new trial. But the case shows that the claim of the plaintiff to the lot in question was based solely upon the character of his possession of it. Admittedly

he had no paper title. The real dispute between the parties to both actions was whether Fredericks' possession was that of a tenant or an adverse possession under claim of ownership. That being so, the testimony of the deceased witness was properly admitted: 1 Greenleaf on Evidence, sec. 164; Orr v. Hadley, 36 N. H. 579; Code Civ. Proc., sec. 1870, subd. 8.

The evidence was sufficient to sustain the verdict. Order affirmed.

We concur: Myrick, J.; McKinstry, J.

KLUMPKE v. ACKERSON.

No. 9446; May 19, 1886.

11 Pac. 31.

Appeal—Harmless Error in Denying Nonsuit.—A plaintiff cannot, on appeal, complain of the denial of a motion for nonsuit made by the defendant, the cause having thereafter been submitted on the merits and judgment rendered thereon.

APPEAL from Superior Court, City and County of San Francisco.

E. W. Ashby for appellant; Chas. F. Hanlon for respondent.

MYRICK, J.—Action to quiet title. Plaintiff's claim to title is founded on a tax deed which omitted a necessary recital. On the trial in the court below, at the conclusion of plaintiff's evidence, the defendant moved for a nonsuit, which was denied. The defendant then offered his testimony, after which the cause was submitted on the merits, and judgment was rendered in favor of defendant. The plaintiff (appellant) admits that since his appeal was taken this court has held a deed similar to that on which he relied to be invalid, but now claims that the court erred in rendering judgment on the merits, and should have rendered judgment of nonsuit.

The motion for nonsuit was made by the defendant. No motion on the part of plaintiff was denied. The case was submitted on the merits, and was so decided by the court. We see no error. The decree in favor of the defendant determined the rights of the parties as presented in this action.

The judgment and order are affirmed.

We concur: McKinstry, J.; Ross, J.

BRANDON v. SUPERIOR COURT.

No. 9066; May 21, 1886.

11 Pac. 128.

Writ of Review—Petition must Show Want of Jurisdiction. Where the petition for a writ of review neither shows nor alleges want of excessive exercise of jurisdiction, the writ will be denied.

Petition for writ of review.

W. H. Allen and G. W. Chamberlain for petitioner.

McKEE, J.—It is manifest, from the facts alleged in the petition, that the justice's court whose judgments we are asked to review had jurisdiction of the subject matter, and of the person of the petitioner, as defendant, in the action in which the judgment was rendered (sections 114, 894, Code of Civil Procedure); and that, by the appeal taken from the judgment, the superior court acquired jurisdiction to try the action de novo (sections 976, 980, Id.). And as it does not appear by any allegations in the petition that either the superior court or the justice's court exceeded its jurisdiction in any part of the proceedings in the case, the application for a writ of review must be denied. So ordered.

We concur: Morrison, C. J.; Myrick, J.; McKinstry, J.; Ross, J.; Thornton, J.

KELLY v. WILSON.

No. 11,595; May 22, 1886.

11 Pac. 244.

Grand Jury—Contempt.—Writ of Prohibition denied.[1]

Application for writ of prohibition. The facts are the same as in the case of In re Gannon, 69 Cal. 541, 11 Pac. 240.

Davis V. Louderbach for petitioner; P. G. Galpin for respondent.

By the COURT.—Upon the authority of In re Gannan, 69 Cal. 541, 11 Pac. 240, this day filed, the application for a writ of prohibition is denied.

[1] **Cited** in Halsey v. Superior Court, 152 Cal. 85, 91 Pac. 993, where the court says of it that it "was decided at the same time as the Gannon case (In re Gannon, 69 Cal. 541, 11 Pac. 240), and was based entirely upon the authority of the Gannon case, and therefore adds nothing to that authority."

Cited and followed in Halsey v. Superior Court, 152 Cal. 75, 91 Pac. 989, in which, as the court say, the precise question was involved, adding (page 76): "It thus appears that the court in these cases construed section 210, Code of Civil Procedure, as only limiting the time in which the persons selected shall serve for the purpose of the drawing and impaneling of a jury, and as having nothing whatever to do with the life of a jury, either grand or trial, once regularly drawn and impaneled."

Cited and approved in State v. Second Judicial Dist. Court, 31 Mont. 437, 78 Pac. 772, where it was held that under the Montana statute the old grand jury, if not discharged by the court, may return an indictment although the new jury list may actually have been made and filed for the term covering the time of such return.

In re Estate etc. of HAWES and Another, Minors.

No. 11,304; May 24, 1886.

11 Pac. 220.

Bill of Exceptions—Proof in Supreme Court—Requisites of Petition.—A petition for leave to prove a bill of exceptions, and to have the same certified as correct, in the supreme court, under section 652 of the California Code of Civil Procedure, sufficiently "sets forth the exceptions taken, and the evidence in support thereof," if it has annexed to it, and made a part of it, as an exhibit, a writing containing the evidence, rulings, and exceptions taken on the hearing in the court below.

Petition for leave to prove bill of exceptions, and have the same certified as correct.

J. C. Bates for petitioner.

FOOTE, C.—The original petition in this case for leave to prove a bill of exceptions, and to have the same certified as correct, under section 652, Code of Civil Procedure, was heretofore held insufficient by this court, and leave given to file an amended petition. That petition as filed has annexed thereto, and made a part thereof, as an exhibit, a writing containing the evidence, rulings, and exceptions taken on the hearing of the application for letters of guardianship of the minors in the court below. In the former opinion of this court the first petition was adjudged insufficient for the reason that it did not "set forth the exceptions taken, and the evidence in support thereof," in the court below: 68 Cal. 413, 9 Pac. 456. The petition now under consideration appears to contain all that which this court has declared requisite, and due notice of the application has been given to the trial judge. Hence the demurrer herein filed should be overruled and the respondents given leave to answer.

We concur: Searls, C.; Belcher, C. C.

By the COURT.—For the reasons given in the foregoing opinion the demurrer is overruled, with leave to respondents to answer.

CRESCENT CITY MILL & TRANSP. CO. v. HAYES.

No. 8948; May 25, 1886.

11 Pac. 319.

Injunction—Pleading—Deprivation of Waters of Lake.—In an action for equitable relief by way of injunction to restrain defendant from draining the waters of a certain lake into the ocean, the complaint averred, in substance, that plaintiff was a corporation engaged in the manufacturing, transportation and sale of lumber; that its mills were located on the banks of said lake, and that it was necessary that a certain depth of water in such lake, which now exists there, should be maintained, the same being essential to the conduct of plaintiff's business; and that a decrease of its depth, or destruction of its navigability, would result in great and irreparable injury to plaintiff. Defendant, in answer to the complaint, denied that plaintiff owned or possessed the mill mentioned in the complaint; that the mill was situate upon said lake; that the lake was navigable; or that the destruction of its navigability would injure plaintiff; or that the defendant intended to obstruct or impair plaintiff's alleged rights therein. Held, that the answer raised issues entitling defendant to a trial on the merits, and that a demurrer thereto should not be sustained.

Thornton, J., dissenting.

APPEAL from Superior Court, County of Del Norte.

This was an action for equitable relief by way of injunction to restrain defendant from draining the waters of a certain lake into the ocean, the complaint averring, in substance, that plaintiff is a corporation engaged in the manufacturing, transportation and sale of lumber; that its mills are located on the bank of said lake and that it is necessary that a certain depth of water in such lake, which now exists there, should be maintained, the same being essential to the conduct of plaintiff's business, and that a decrease of its depth, or destruction of its navigability, would result in great and irreparable injury to plaintiff. Defendant, in answer to the complaint, denied that plaintiff owned or possessed the mill mentioned in the complaint; that the mill was situate upon said lake; that the lake was navigable, or that the destruction of its navigability would injure plaintiff; or that defendant intended to obstruct or impair plaintiff's alleged rights therein.

Plaintiff demurred to defendant's answer on the ground that it did not raise issues entitling defendant to a trial. The demurrer was sustained, and defendant appealed.

W. A. Hamilton, J. J. De Haven and J. D. H. Chamberlain for appellant; R. G. Knox and L. F. Cooper for respondent.

By the COURT.—The amended answer filed in this cause raised issues entitling defendant to a trial upon the merits. The order sustaining plaintiff's demurrer to the amended answer was therefore erroneous.

Judgment reversed and cause remanded, with directions to the court below to overrule the demurrer.

Thornton, J., dissenting.

HEYWOOD, Executor, etc., v. BERKELEY LAND & TOWN IMP. ASSOCIATION and Others.*

No. 8296; May 26, 1886.

11 Pac. 246.

Lease—Breach of Covenant to Operate Ferry.—A covenant in a lease that premises should be "used in good faith, continuously, during the existence of the lease, for the usual and ordinary business of a ferry (a boat having theretofore made regular daily trips therefrom), held to be broken by failure to operate the ferry during a period of twenty-nine days.

APPEAL from Superior Court, County of Alameda.

H. A. Powell for appellant; Edward J. Pringle for respondent.

BELCHER, C. C.—This is ejectment to recover certain leased premises, upon the ground that the lease had become forfeited and void. It appears from the record that on the fourth day of April, 1877, Z. B. Heywood leased to the de-

*For subsequent opinion in bank, see 71 Cal. 349, 12 Pac. 232.

fendant the Berkeley Land & Town Improvement Association, a corporation, the Berkeley Ferry wharf, with two strips of land, on one of which the wharf was constructed, for the term of ten years, at the rental of one dollar per year, payable in advance, with an agreement at the end of the term to execute "a new lease, similar in all respects to this, and to run the same period of ten years," and "that this renewal clause shall be inserted in said new lease verbatim." In consideration of receiving the lease the lessee covenanted and agreed, among other things, "that said leased premises shall be used in good faith, continuously, during the existence of this lease, for the usual and ordinary business of a ferry to and from the city and county of San Francisco, and shall not be used for any other purpose whatever." The lease further provided as follows: "And it is distinctly understood and agreed by and between the parties hereto that if default be made in any of the covenants herein contained on the part and behalf of the said party of the second part, its successors or assigns, to be paid, kept, and performed, in any particular, as to time or circumstance, then and from thenceforth this indenture of lease shall be forfeited and become void, and it shall and may be lawful for the said party of the first part to re-enter in and upon said leased premises, and the same to have again, repossess, and enjoy."

Immediately upon the execution of the lease the lessee put upon the route a steam ferry-boat, which continued to run, making daily trips, and carrying freight and passengers, between West Berkeley and the city of San Francisco, until the first day of April, 1880. On that day the boat was libeled and seized by the United States marshal for money due its officers from the improvement association, and it remained tied up in the custody of the marshal until the twenty-ninth day of the month, when it was sold by him, under judicial process, to the defendant R. P. Thomas. The improvement association then assigned its lease to Thomas, and on the evening of the day of sale the boat resumed its trips, and thereafter continued to make them daily up to the time of trial.

Between the 1st and the 29th of April no ferry-boat was run between the leased wharf, or any point at or near West Berkeley and the city of San Francisco, and no other boat, except a small schooner four feet deep and twenty years old,

which was owned and operated by other parties. The schooner made occasional trips, in all seven or eight, as wind and weather would permit, but, as her master testified, "sometimes she would be gone a week, and sometimes she would come back in half a day, according to how the weather was. She had to go with the wind and weather, and she could not possibly go regularly." The rent of one dollar per year reserved in the lease was nominal; the answer admitting that the rental value of the leased premises was three hundred dollars per year, and some of the witnesses testifying that it was twelve hundred dollars. The real consideration that moved Heywood to make the lease was the fact that he owned a large amount of property at West Berkeley besides the leased premises, and believed that that property would be greatly enhanced in value if a regular ferry could be established and maintained between that place and the city of San Francisco. Heywood died in 1879, and this action was commenced by the executor of his estate in May, 1880.

The case was tried by the court, and its findings and judgment were in favor of the defendants. The plaintiff moved for a new trial, and, his motion being denied, appealed from the judgment and order. The court found that the leased premises "have, since the first day of April, 1880, been used in good faith, continuously, for the usual and ordinary business of a ferry to and from the city and county of San Francisco, and for no period since the first day of April, 1880, were the said leased premises not used for the business or the purposes of a ferry."

The principal question presented for our determination is, Was this finding justified by the evidence, the substance of which we have stated, and in which there was no material conflict? We do not think it was. There is no pretense that the ferry was operated at all between the 1st and the 29th of April, and we are unable to see how the ferry wharf could have been used in good faith, continuously, for the usual and ordinary business of a ferry, when no ferry-boat went from or to it during all of that time. A ferry requires a ferry-boat, and the usual and ordinary business of a ferry is the transportation of passengers and freight between the ferry landings. How, then, can it be said that a ferry wharf has been used continuously for ferry business when the ferry-boat has

been tied up, and its trips discontinued, for twenty-eight consecutive days.

We attach no importance to the fact that the small schooner sometimes went over and took freight from West Berkeley, as it was owned and operated by other parties, who never undertook or were even requested to do the ferry business.

The parties to the lease expressly stipulated that the lease should be forfeited and become void, and the lessor should have the right to re-enter and repossess the property, whenever the lessee, its successors or assigns, should fail, in any particular as to time or circumstance, to keep and perform the covenants of the lease. In our opinion, the covenant that the premises should be "used in good faith, continuously, during the existence of this lease, for the usual and ordinary business of a ferry to and from the city and county of San Francisco," was broken by the failure, under the circumstances disclosed by the evidence, to operate the ferry from the 1st to the 29th of April. When the breach occurred the plaintiff had the right to re-enter upon the property, and to maintain an action of ejectment for its possession: Civ. Code, sec. 793. Courts of equity often relieve against forfeitures (Keller v. Lewis, 53 Cal. 118; Giles v. Austin, 62 N. Y. 486); but whether a court of equity would relieve against this forfeiture is a question which, as the case is now presented, does not arise.

The expenditures upon the wharf and boat, relied upon by the respondents, were made before the lease was executed, and therefore cannot aid them.

The one dollar rent for the year commencing April 4, 1880, was paid in March. It was not necessary that that should be returned in order that the plaintiff might maintain his action.

The judgment and order should be reversed and the cause remanded for a new trial.

We concur: Foote, C.; Searls, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

MANCELLO v. BELLRUDE.

No. 11,672; June 15, 1886.

11 Pac. 501.

Prohibition.—Writ of Prohibition Denied on the ground that the proper remedy is by appeal.[1]

Application for writ of prohibition.

An action was commenced in Justice Bellrude's court, of Marin county, by the North Pacific Coast Railroad Company against petitioner, Mancello, for forcible detainer. Defendant in that action, by a verified answer, denied any unlawful or forcible detainer, but made other allegations which he claims necessarily involved the question of title and possession to the real property. Defendant, before and during the trial, moved to suspend further proceedings, and to certify the pleadings to the superior court. The justice refused to entertain the motion, proceeded with the trial, and gave judgment in favor of the plaintiff. Thereupon defendant made application to the superior court for a writ prohibiting the justice from proceeding further in the cause, or issuing execution or final process therein. The writ was denied. Thereupon defendant filed this petition, alleging want of jurisdiction on the part of the justice, and that he had already exceeded his powers in the cause, and that unless he be restrained he will issue and cause execution and final process ejecting defendant from the premises.

W. W. Fitz Maurice for petitioner.

By the COURT.—We think the remedy of the petitioner is by appeal, and that the application for a writ of prohibition should be denied. So ordered.

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[1] **Cited** in Havemeyer v. Superior Court, 84 Cal. 398, 24 Pac. 139, where it is said appeal was a complete and adequate remedy in the cited case, whereas in the citing case it would have afforded none, on account of the irreparable damage that might have occurred meantime; wherefore the necessity of a writ of prohibition.

Cited and approved in Campbell v. Durand (Utah), 115 Pac. 989, where the court say: "It is manifest that the writ of prohibition cannot be employed to undo a thing already done, though done in excess of jurisdiction. Prohibition is a preventive, not a corrective, remedy."

HEGARD v. CALIFORNIA INS. CO.*

No. 11,073; June 29, 1886.

11 Pac. 594.

Evidence—Judicial Notice of Legal Distances.—Courts in California will take judicial notice of the legal distances from place to place in the state of California, as established by the Political Code in sections 150 to 202, inclusive, for the purpose of computing the time within which notice of intention to move for a new trial must be served.

Fire Insurance—Misrepresentations.—Findings in an Action on an Insurance policy that plaintiff had not misrepresented his ownership of the property insured, nor its value, held sustained by the evidence.

Fire Insurance—Action on Policy—Complaint—Defects Cured by Answer.—Where a plaintiff in his complaint fails to state material facts, as, in an action on an insurance policy, failing to set out or attach and make a part of the complaint the application for insurance, so that no cause of action is stated, if these facts are supplied by the averments of the answer, the omission is immaterial, and the defect is cured.

Fire Insurance—Action—Matters of Evidence not to be Alleged.—The fact that a policy of insurance declared the measure of recovery for loss sustained on an insurance policy must be "in no case greater than the actual damage to or cash value of the property at the time of the fire," only established a rule as to the proof necessary to be made in order to show the damage or loss sustained, and it is unnecessary to allege in the pleading the actual cash value of the premises, this being a matter of evidence.

Fire Insurance.—If, in an Action on an Insurance Policy Covering Several Classes of property, the complaint states the amounts of the losses upon the various kinds of property insured separately, and demand for judgment for the aggregate sum of such losses is made, this will be sufficient for the purpose of informing the defendant how much, and on what account, the plaintiff claims to recover it.

Fire Insurance—Recovery on Policy—Actual Cash Value.—Where an insurance policy provides that in no case shall the recovery be greater than the actual damage or cash value of the property, a finding that the loss sustained on account of the destruction of a building by fire was a certain sum, the amount insured for, is sufficient, and the court need not state the evidential fact that the cash value of the property when destroyed was a certain sum.

*For subsequent opinion in bank, see 72 Cal. 535, 14 Pac. 359.

Fire Insurance—Depreciation of Property—Evidence.—Under an insurance policy providing that "the cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same, and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing the same shall be made to ascertain the actual cash value," the court does not err in refusing to allow the defendant to prove depreciation in the value of the building which occurred anterior to the time of its being insured

Fire Insurance—Fixtures.—Parol Evidence is not Admissible as to what is meant by the words "barroom fixtures" as used in an insurance policy.

APPEAL from Superior Court, City and County of San Francisco.

E. W. McGraw for appellant; W. W. Kellogg and R. H. F. Variel for respondent.

FOOTE, C.—The respondent, Hegard, makes the point that this cause should be considered here upon the judgment-roll only, for the reason that the notice of intention to move for a new trial on the part of the appellant, although served within the statutory period of ten days, was not so filed. From the statement on motion for a new trial it appears that findings were filed on the fifth day of February, 1885; that the attorneys for Hegard, at all times during the pendency of this action, resided and had their offices at Quiney, Plumas county, state of California, and that the attorney for the defendant resided and had his office at San Francisco, in the same state, and there was at all times regular communication by mail between those two places; that on the sixth day of February, 1885, one of the attorneys for the plaintiff deposited in the postoffice at Quincy an envelope addressed to the defendant's attorney at San Francisco, California, which envelope contained two duplicate notices signed "W. W. Kellogg and R. H. F. Variel, Attorneys for Plaintiff," to the effect that the trial court, on February 5, 1885, had filed its findings and decision in favor of the plaintiff, which notices were entitled in the proper case, and the envelope also contained a note from Mr. Variel to Mr. McGraw, the defendant's attorney, requesting him to indorse service of notice of decision, and return the same to him (Variel). That en-

velope and its contents were received by Mr. McGraw at San Francisco on the 10th of February, 1885, and he indorsed acknowledgment of the receipt of one of the notices as of that date, and on the 16th of the same month mailed it, and a notice of intention to move for a new trial in the cause, to Mr. Variel at Quincy, California, prepaying the postage thereon. That notice was in due and proper form, and specified that the motion would be made on a statement thereafter to be prepared, and would be made on the following grounds: Insufficiency of the evidence to justify the decision of the court, and that it was against law; error in law occurring at the trial, and excepted to by the defendant. On said February 16th, Mr. McGraw also mailed, at San Francisco, a duplicate of that notice of intention to move for a new trial, together with a request to file the same, to the county clerk at Quincy, California. Mr. Variel received the notice addressed to him on the night of February 20, 1885. The county clerk received that addressed to him on February 21, 1885, and filed it on that day. On February 24, 1885, defendant caused to be served on R. H. F. Variel at Quincy aforesaid, by the sheriff of Plumas county, a certified copy of the notice of intention, which the county clerk had filed as above stated. Mr. Kellogg was not at any time during the month of February, 1885, in Plumas county, but (as was known by the attorney for defendant) was at Sacramento, California, performing his duties as a member of the state Senate.

The contention of the respondent is that, as it appears from the record that the notice of motion to move for a new trial was not filed one day after the statutory time, the appellant cannot be heard here on its appeal from the order refusing a new trial; that there is no evidence of a proper character in the record which shows that Quincy, in Plumas county, is twenty-five miles or any other distance from San Francisco; and that this court will not take judicial notice of the legal distances from place to place in the state of California as established by the Political Code in sections 150 to 202, inclusive. In support of this proposition the case of Neely v. Naglee, 23 Cal. 152, is cited. There this court held that the statute of 1858 establishing legal distances in this state from each county seat to the capital, lunatic asylum, and state prison, had no application to the question of notice then be-

fore the court, but referred to the amount of mileage that county treasurers and sheriffs might charge for certain purposes.

The sections of the Political Code, supra, established the legal distances therein set out without any qualification, and hence they are established for any and all purposes. By section 177 thereof it appears that the legal distance from Quincy, the county seat of Plumas county, to Sacramento, is one hundred and thirty-six miles; by section 182, same code, that San Francisco is eighty-four miles from Sacramento. The legislature, in fixing the boundaries of the different counties of this state, does not locate Plumas county as touching Sacramento county at any point, nor San Francisco county as adjoining either Sacramento or Plumas county; and, as geographical facts, it is well known that Plumas county is in the northeastern part of this state, and that San Francisco is on the bay of that name near the Pacific ocean, southwesterly from the former county, and that several other counties intervene between them. And Quincy is established by law as the county seat of Plumas county, and San Francisco as that of the county of the same name; thus making those points well known geographically.

If San Francisco, in the absence of all judicial knowledge as to its geographical position, was presumed to be eighty-four miles in a direct line between Sacramento and Quincy, the first mentioned would still appear to be fifty-two miles from Quincy, which would give one day more of time in which to file the notice in question than was actually taken. It appears, therefore, proper that this court should take judicial notice of those things established by law, as being such as ought to be generally known within the limits of its jurisdiction, and therefore should hold that the notice objected to as insufficient was filed and served in time.

The action under consideration was commenced to recover for loss by fire on an insurance policy issued to Hegard by the appellant. The plaintiff recovered a judgment for nineteen hundred and fifty dollars, and from that, and an order denying a new trial, the defendant appealed.

In the answer it was pleaded, in bar of the plaintiff's right to recover, that the latter had overvalued the property insured, and was not the sole owner of the building burned,

which was a portion of such property. Upon both of those contentions the court found against the defendant.

The policy recites, among other things, that "reference is had to application and survey No. ——, hereby made a part of this policy, and a warranty by the assured. The application and survey, if referred to in this policy, shall be considered a part of it, and a representation by the assured. If the assured in a written or verbal application for insurance, or by a survey, plan, or description, makes any erroneous representations, ... or overvalues the property, ... or if the interest of the assured be any other than the entire unconditional and sole ownership of the property, and is not so expressed in the written portion of the policy. . . . . or if the building insured stands upon leased ground, and is not so represented to the company, and so expressed in the written portion of this policy, then, in every such case, this policy shall be void."

The interest of the assured in the property insured, including the building and the amount of insurance, was described in the written portion of the policy as follows: "$2,000; $1,200 on his one and one-half story frame building occupied by the assured as a saloon and chop-house, situate on the S. side of Main street, in the town of Quincy, Plumas Co., Cala.; $250 on his bar-room fixtures; $400 on his stock of liquors and cigars; and $150 on his stove and cooking utensils, counter, tables, and chairs, all while contained in the above-described building. It is understood that the above-described building stands on leased ground." It will be seen, therefore, that the assured did not represent himself as the owner of the land on which the building stood, and the defendant was thus informed that the plaintiff claimed the building only, and not the land.

There is some apparent conflict between the statements which the latter made in his affidavit of proof of loss, and those contained in a certain deed and agreement introduced in evidence, and his oral statement when testifying as a witness on the trial of the cause; but the court heard his testimony, observed his manner, conduct, and method of testifying, and must have come to the conclusion that there had been no dishonest or intentional misrepresentation on his part as to his ownership of the building insured at any time, and

must have believed his statement and explanations on the point as to how he was really the owner of the entire building, as separate from any interest in the land on which it stood, and we cannot say that such conclusion, or the finding upon this fact, in the case, was wrong. Nor do we perceive that the trial court was not warranted from all the evidence in finding that there was no such overvaluation by the plaintiff of the property insured as would render the policy void on that account: Clark v. Phoenix Co., 36 Cal. 176; National Bank v. Insurance Co., 95 U. S. 673, 24 L. Ed. 563.

The appellant further contends that upon the judgment-roll reversible errors appear as follows: In that the complaint did not have attached thereto as an exhibit, or otherwise made a part thereof, the application for insurance, within the rule established by this court in Gilmore v. Lycoming Ins. Co., 55 Cal. 124; in that the complaint contained no allegation of a loss within the policy, because, as appellant alleges, no allegation appears therein as to any value, or actual cash value, of any of the property; in that no finding was made by the court of the cash or any other value of the building insured. As to all those positions, thus assumed, we are of opinion that they are not well taken.

The plaintiff, it is true, did not follow the rule of pleading as required in the case in 55 Cal., supra, but the defendant in its answer set out the tenor and effect of the application, and pleaded two breaches of the contract of insurance by the assured, based thereon, in bar of the plaintiff's right to recover, and evidence upon all the issues thus raised by the pleadings was heard and passed upon by the court, as shown by the findings, and the defect in the complaint was cured by the averments of the answer: Pom. Rem., sec. 579.

The complaint, we think, contains all the necessary allegations, under the policy, as to value of property insured, and loss occasioned by its being burned. The fact that the policy declared the measure of recovery for loss sustained must be "in no case greater than the actual damage to or cash value of the property at the time of the fire," only established a rule as to the proof necessary to be made in order to show the damage or loss sustained, and it was unnecessary to allege matters of evidence in the pleading.

In the complaint the amounts of the losses upon the various kinds of property insured were stated separately, and demand for judgment for the aggregate sum of such losses was made, and that was sufficient for the purpose of informing the defendant how much, and on what account, the plaintiff claimed to recover against it: Boone, Code Pl., sec. 18. The court found that the loss sustained by the plaintiff on account of the destruction of his building by fire was twelve hundred dollars, the amount it was insured for; and, more, it does not seem necessary that the learned judge should have gone further, and stated the evidential fact that its cash value, when so destroyed, was a certain sum.

The evidence relative to the value of the building when burned was pertinent as far as it went, and tended to prove the loss as claimed, and we do not feel warranted in condemning the findings upon that matter as not being supported by evidence. Nor do we think the court erred in refusing to allow the defendant to prove depreciation in the value of the building, which occurred anterior to the time of its being insured.

The policy, with reference to measure of recovery for loss of the building, reads as follows: "The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in case of the depreciation of such property from use or otherwise, a suitable deduction from the cash cost of replacing the same shall be made to ascertain the actual cash value."

We have been cited to no case, nor have we been able to find any after diligent search, which declares what construction shall be given to such language in its entirety as to the measure of damages. But it seems fair to conclude that the parties to this contract, when they entered into it, had in view the value of the building as it then stood, and that they did not intend to provide for any deduction for depreciation in value thereof which had occurred from the time when it was built, many years before that time, up to that when it was insured. It is much more reasonable, and fairer to all parties, to construe that language (so far as it relates to the question of a suitable deduction from the cash cost of replacing the building) to mean such depreciation as might take place after

the defendant insured the property, as before that time the defendant is not shown to have had any connection with the building, or interest in its preservation. This is in accordance with the general rule that, if there exists any ambiguity in a policy of insurance, it should be taken most strongly against the insurers (May, Ins., secs. 175, 176); and since the defendant did not avail itself of the offer made by the court to allow evidence to be introduced as to depreciation in value of the building after its insurance, it is fair to presume that none had taken place.

The plaintiff was allowed, against the objection of the defendant, to introduce evidence explanatory of his and the insurance agent's understanding, at the time the policy was taken out, as to what articles of property were to be insured under the head of "barroom fixtures." We do not think that there was anything in those words of such ambiguity as to admit of parol testimony to explain what was meant by the parties to the contract in making use of them. The term "fixture" has a well ascertained and certain meaning, as something affixed to realty; and the word "barroom" has a certain meaning, and there could be no doubt that "barroom fixtures" inserted in the policy could only be reasonably interpreted to mean fixtures in a barroom. Hence all the evidence which was admitted to prove the loss of property as being included in those words of the contract, which would not be held to be so included by the use of such words as ordinarily understood, and as we understand their meaning in such an instance as above stated, should have been ruled out by the court, and the plaintiff was not entitled to recover anything based on that evidence.

We perceive no further prejudicial error in the record, but for that heretofore indicated the judgment and order should be reversed.

We concur: Belcher, C. C.; Searls, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

PICO v. WILLIAMS, Judge, etc.

No. 11,680; July 2, 1886.

11 Pac. 600.

Superior Court—Holding Court in Another County.—The Request of the Governor of the state of California to the judge of the superior court of one county to hold a superior court in another county is sufficient authority to entitle the latter to take jurisdiction of causes brought before him for trial in such county.

Application for writ of prohibition.

The petition alleged that the petitioner was a party to an action before the superior court of Los Angeles county, Cheney, J.; that some of the parties to such action, desiring a speedy trial, made application for advancement of the cause on the calendar, but that such application was denied because of the precedence on the calendar of other causes of as much public importance; that such parties then applied to the governor of the state of California, and requested Judge Williams, of Ventura county, to hold a superior court in Los Angeles county for the purpose of trying this among other cases. Petitioner then alleged that the facts as stated, that a speedy trial could not be had in Judge Cheney's court, are untrue, and the petitioner asked for a writ of prohibition to restrain Judge Williams from so holding court, or trying such cause.

Glassell, Smith & Patton for petitioner; Stephen M. White for respondent.

By the COURT.—We are of opinion that, from the facts stated in the petition, the petitioner is not entitled to a writ of prohibition. The request of the governor, as set forth in the petition, was sufficient authority for Judge Williams to hold a superior court in the county of Los Angeles. It is therefore unnecessary to consider any issue raised by the answer of respondent.

The application for a writ of prohibition is denied, and the alternative writ heretofore issued is annulled.

PEOPLE ex rel. VAN VALER and Others v. JACOBS and Others.

No. 11,360; July 15, 1886.

12 Pac. 222.

Swamp Lands—Cancellation of Patent—Attorney General.—When a suit is instituted in the name of the state, by the permission of the attorney general, upon the relation of the real party in interest, seeking the cancellation of the patent for state swamp lands, and the state has no direct interest in the event of suit, the attorney general is not authorized to move to dismiss, or to withdraw his consent to the use of the name of the people to the prejudice of the relator.[1]

Appeal — Transcript — Missing Papers — Dismissal.—Where respondent in his brief suggests imperfections in the transcript because of the absence of necessary papers and because the transcript is not properly certified, and appellant, at the hearing, files the requisite papers with the proper certificate, the motion to dismiss should be denied.

APPEAL from Superior Court, Tulare County.

Action brought by the attorney general January 19, 1884, to cancel a patent issued by the state of California to the defendants, November 23, 1883, for a tract of swamp land in Tulare county. On motion of the attorney general the action was dismissed. The relators appealed.

The motion to dismiss the appeal was based on the fact that the clerk had not properly certified the transcript as required by rule 4 of the supreme court, and that certain papers had been omitted and was made under rule 13.

F. P. Stratton, Latimer & Morrow and W. M. Pierson for appellants; Brown & Daggett for respondent.

[1] Cited and followed in People v. Garrison, 72 Cal. 290, 13 Pac. 858, where the court say the attorney general has no right to withdraw his consent, once given, to the use of his name in these quasi state cases to the prejudice of relators.

By the COURT.—The certificate of the clerk of the court below, filed at the hearing, is sufficient, and the motion to dismiss is denied.

On the authority of People v. North San Francisco, H. & R. R. Assn., 38 Cal. 564, the judgment is reversed and cause remanded.

MILLER v. DUNN.

No. 11,288; July 15, 1886.

11 Pac. 604.

Taxation—Power to Tax for Void Debt.—The legislature in California has no constitutional power to tax the people to pay a void debt. So held where, after the courts had declared unconstitutional and void the act of April 23, 1880, entitled "An act to promote drainage," the legislature attempted to pass another act on March 10, 1885, providing for the payment of indebtedness incurred under said act of April 23, 1880.

APPEAL from Superior Court, County of Sacramento.

D. M. Delmas for appellant; A. L. Hart for respondent.

MYRICK, J.—Under a contract made in pursuance of the act of April 23, 1880, entitled "An act to promote drainage" (Stats. 1880, p. 123), the plaintiff performed work and furnished material, and his claim therefor was audited and allowed by the state board of drainage directors, as provided for in the act. That act was declared unconstitutional by this court: People v. Parks, 58 Cal. 624. On the 10th of March, 1885, an act was approved to appropriate money to pay the indebtedness incurred under the act of April 23, 1880, which act of March 10, 1885, provided for the payment of all audited claims out of the state drainage construction fund, so far as that fund was sufficient, the remainder to be paid out of the general fund. The controller refused to issue his warrant for the amount of plaintiff's allowed claim, and this action for a writ of mandate was brought. The court below ordered the writ to issue.

It is not averred in the complaint, nor does it appear in the case, that any moneys were collected under sections 15 and 16 of the act of April 23, 1880; therefore we are not called upon to consider the power of the legislature to dispose of any funds so collected. We treat the case as if the whole amount was directed by the act of March 10, 1885, to be paid out of the general fund of the state treasury.

The constitution, article 4, section 32, declares that the legislature shall have no power "to pay, or to authorize the payment of, any claim against the state, or any county or municipality, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void." This court declared the act of April 23, 1880, to be unconstitutional; therefore it was void, and the contract made in pursuance of it was also void. The legislature was and is prohibited from paying or authorizing to be paid, any claim under it.

The argument that there was a statute in the statute book which authorized the contract, and that it is sufficient to take plaintiff's claim out of the prohibition of the constitution, is not of apparent force. It was said by this court in Nougues v. Douglass, 7 Cal. 70: "If, then, the legislature had no right to create a state debt beyond the limit fixed by the constitution, that body has no constitutional right to tax the people to pay a void debt. The power of taxation for purposes contemplated by the constitution is unlimited in the legislature, but such power does not exist for purposes not sanctioned by that instrument, but expressly prohibited. The restriction upon the power of the legislature would be nugatory if the same end could be accomplished by other modes. The evil intended to be prevented would still exist, and the injury to the people would be the same. If the power to create a debt is denied, the power to levy taxes to pay it must equally be denied. The power to pay is a necessary incident to the power to contract, and they both must stand or fall together."

We do not perceive how the legislature can authorize the payment of moneys which it is prohibited from authorizing to be paid.

The judgment is reversed and cause remanded.

We concur: McKinstry, J.; Ross, J.

BANK OF CHICO v. SPECT, Executrix, etc.

No. 11,175; August 3, 1886.

11 Pac. 740.

Administration — Presentation of Claims — Evidence.—Where there was no proof of the signature of the executor to the rejection of a claim against an estate, held, that there was no proof of the presentation of the claim.[1]

Park Henshaw, for appellant, Bank of Chico; J. T. Harrington for respondent, Spect, executrix, etc.

By the COURT.—The answer raised an issue as to the presentation of the claim to the executor. The decision is sustained by the evidence. There was no proof of the signature of the executor to the rejection of the claim, and therefore no proof of presentment.

Judgment and order affirmed.

RICHARDS, Executor, v. DONNER.*

No. 9579; August 12, 1886.

11 Pac. 770.

Deed of Gift—Undue Influence.—Where a Deed of Gift was Executed upon consideration of love and affection, and afterward suit was brought by the grantor to cancel the deed, charging the grantee with using undue influence over the grantor in procuring the execution of the deed, in the absence of proof of such undue influence, or of any degree of turpitude on the part of the grantee in receiving and recording the deed, held, that the deed was valid.

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[1] Cited and approved in Murray v. Johnson (S. D.), 134 N. W. 207, where the plaintiff had offered no proof of the signature of the administrator attached to the rejection of the claim, relying on the clerk's testimony that the claim was "a record of the probate court." The court says that since the statute does not require a rejected claim to be filed, it follows that a rejected claim is not, and cannot be, such a record.

*For subsequent opinion in bank, see 72 Cal. 207, 13 Pac. 584.

J. E. Richards, S. F. Leif and Moore, Laine & Johnson for respondent, Richards, executor; S. O. Houghton, J. T. Campbell and Rutledge & McConnell for appellant, Donner.

FOOTE, C.—This action was originally brought by A. W. Peck, in his lifetime (for whom his executor, Richards, has been substituted), for the purpose of canceling a deed of gift made by said Peck to the defendant, M. E. Donner, while he was in such an enfeebled mental condition, and so circumstanced in his surroundings, as that he did not understand or appreciate the nature, effects, and consequences of the execution and delivery of that deed. A judgment was rendered for the plaintiff, and from that, and an order denying her a new trial, the defendant has appealed.

Several points are presented by appellant for consideration; but in the view we take of the case, as hereinafter set forth, it is unnecessary to pass upon them.

The court found, in substance, as grounds for rendering judgment for the plaintiff, that A. W. Peck, while a visitor at the house of the defendant's mother, where the defendant resided on the twelfth day of April, 1882, received a severe paralytic stroke, which greatly weakened his physical and mental faculties; that while in such condition, on the twentieth day of April, 1882, still sojourning in the house of defendant's mother, he proposed to make a will of the property in controversy to the defendant, toward whose family for many years he had entertained intimate and familiar friendship; that on the next day, by the advice of John Walker, a neighbor and friend of that family, and the acting executor of defendant's father, he was induced to consent that a deed, rather than a will, should be prepared—Walker having assured him it would be more advantageous and less trouble and expense so to transfer the property to Mary E. Donner; that he had no other advice on the subject, and that Walker did not explain to him the difference between a will and a deed in their effects and consequences as to him, A. W. Peck; that on that day, and following immediately such advice, and without such explanation, a deed of grant, bargain, and sale, upon consideration of love and affection, was prepared and presented to him, which he there and then signed and acknowledged, and that it was

the deed under consideration in the cause—he believing, at the time he signed the deed, that he was in imminent danger of death, having informed the party witnessing the same that "he might not be living on the following day"; that, after the signing and acknowledging of said deed, it was, at his request, taken in charge by the notary taking the acknowledgment thereof; that he afterward, on the third day of May, 1882, procured his old friend Beach to correct the description therein of the property conveyed, and gave it to the mother of the defendant for the latter; that there was no consideration moving him, in the execution of the deed, save love and affection; that at all those several times he stated that he was to have the control of the property conveyed, and its usufruct as long as he lived, and that he was assured that such should be the case by said defendant; that he not only relied on her statement as true, but believed that such advantages, uses, and right of property were assured to him by the deed he had executed and delivered, and had he been made to understand that such was not the case he would not have made such deed; that during all those times of his illness, up to the sixth day of July, 1882, he remained in the family and at the house of defendant's mother, and the greater part of that time was under treatment by a physician called by said mother, which said physician had drafted said deed, and, as a notary, taken the acknowledgment thereof; that no other solicitations or representations were made to him about the relative characteristics and legal force of a will or deed by anyone except said John Walker, nor any fraud or misrepresentation practiced by anyone, except so far as he was deceived with the belief that he had, by the terms of that deed, reserved to himself during his life the use and occupation of the premises conveyed, which was brought about by the silence of the defendant, and that of her mother and others present; that on the ninth day of August, 1882, Peck demanded of the defendant in writing that she reconvey his property to him, and that a proper deed for such purpose was tendered for her execution, as also the money necessary for her attention thereto and proper acknowledgment thereof; that such demand and tender was made before suit brought, and the demand entirely refused: that at no time after the

signing of said deed did Peck ratify or affirm it; that from the time he received the paralytic shock, on the twelfth day of April, before the signing of the deed, until his death, he continued in feeble health, and greatly impaired in mind and body; that Peck died on the tenth day of September, 1882, in Santa Clara county; that he left a will which was duly admitted to probate, of which John E. Richards, who has since his death been substituted for him as plaintiff, was constituted executor, and that he was duly qualified and acted as such.

As a conclusion of law from these facts it was found that the plaintiff was entitled to reconveyance of the property described in the complaint and the deed in controversy, and to recover his costs.

We do not think that the facts, as found by the court, show the least degree of turpitude on the part of Miss Donner in receiving and recording the deed which Peck made to her. He executed the deed after consultation with Walker, with whom no one is shown to have used any influence whatever. She was a young woman to whom Peck was strongly attached. He had often declared his intention to give, at his death, what he possessed to her or her mother. He was not solicited in any way by her or her mother to execute the deed; and some days after he had executed it he corrected the description of the property therein by the assistance of a good friend of his—thus showing no disposition to revoke the deed, because it was not a will. The defendant sent him a power of attorney, as he requested; thus, at least, showing her good faith in fulfilling her promise to him that he should enjoy the rents and profits of the property he had given her.

The matter charged against her was undue influence over Peck in the execution of the deed of gift. She is never by the findings placed in any position whereby she either could or did influence Peck to make this deed; and if a mistake was made by him, and that which he intended to execute as a will he did make a deed, it was his mistake, with which, upon the issues in this cause, Miss Donner, so far as the record discloses, has nothing to do.

We are of opinion that the judgment and order should be reversed, and the court below directed to enter judg-

ment in favor of Miss Donner on the findings in accordance with the views we have herein expressed.

We concur: Belcher, C. C.; Searls, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded, with directions to the court below to enter judgment in favor of defendant.

LAMET v. MILLER and Others.*

No. 11,177; August 12, 1886.

11 Pac. 744.

Bill of Exceptions.—On Appeal from a Judgment on the Pleadings, the bill of exceptions must show that the appellant excepted to the order granting the motion for judgment, or that he was absent from court when the order was granted, in which case the order is deemed to have been excepted to: Code Civ. Proc., sec. 647.

W. A. Gett, Jr., and Martin & Jones for respondent, Lamet; Grove L. Johnson for appellants, Miller and others.

By the COURT.—We cannot take notice that plaintiff moved for judgment on the pleadings, or that the motion was granted. Recitals in a judgment entered by the clerk are ordinarily immaterial; at least, on direct appeal. They are not necessary to the judgment, are not ordered by the court, and are frequently but the clerk's exposition of events antedating the judgment: Lesse v. Clark, 28 Cal. 36.

Here the judgment, with the recitals preceding it—all constituting one continuous writing—is signed by the superior judge. We do not find it necessary to say that, if the recitals contained all the essential elements of a bill of exceptions, we would treat them as a bill of exceptions signed and settled by the judge. Regularly, a bill of exceptions should be a distinct writing from the judgment. It may be that the introduction of matter which would constitute a bill of excep-

*For former opinion, see 68 Cal. 521, 9 Pac. 669.

tions into a writing, including both such matter and the judgment proper, and signed by the judge, will not deprive the matter alleged to be improperly inserted of its character as a bill of exceptions. The only important thing may be the certificate of the judge to a statement of facts which occurred in the court below.

It is enough to say in this case, however, that, even if the writing signed by the judge should be treated as a bill of exceptions as well as a judgment, it does not appear therefrom, either that the defendants excepted to the order granting the plaintiff's motion for judgment on the pleadings, or that they were absent when the order was made. An order made in the absence of the party is deemed to have been excepted to: Code Civ. Proc., sec. 647. But this does not relieve the party against whom such an order is made of the necessity of presenting and having settled a bill which shall show that the order was made under circumstances which would give him the benefit of the presumed statutory exception; that is, that it was made in his absence.

The recitals preceding the judgment do not show that the defendants were absent when the order was made. The fact that the motion was taken under advisement would not create a presumption of defendants' absence.

When a bill of exceptions is necessary, it must always contain a statement of the facts which will authorize this court to review the action of the court below. If the defendants were present when the order was made, they should have excepted to it. If they were not present, that fact should have been made clearly to appear in a bill of exceptions. Judgment affirmed.

SMITH v. IDAHO QUARTZ MIN. CO. and Others (SILVESTER, Intervener).

No. 11,425; August 12, 1886.

11 Pac. 878.

Trespass.—Findings Held Justified by the evidence.

APPEAL from the Superior Court, County of Nevada.

Action to recover the possession or value of certain timber and wood which plaintiff alleged defendant had cut and carried away from land of which plaintiff claimed to be the owner. Defendant failed to answer, and was defaulted. One Silvester intervened, claiming the wood against both plaintiff and defendant, and denying that plaintiff was the owner of the premises, or that he had any interest therein other than as a mortgagor for the sum of two hundred dollars, and also that the wood cut and carried away had been so cut and taken by persons who were in possession of the premises under a claim of title adverse to the plaintiff. Evidence was introduced on these matters, and the court held in accordance with the allegations made in intervener's pleading, and rendered judgment against plaintiff. Plaintiff appealed on the ground of insufficiency of the evidence to justify the findings and decision, and because of error at the trial in not compelling the intervener to open the case; but, instead, holding that the burden of proof was on plaintiff.

J. I. Caldwell for appellant; E. W. Roberts and A. Burrows for intervener.

By the COURT.—The court was justified by the evidence in finding that the plaintiff was not the owner of the premises upon which the wood and timber had been cut, and had no interest in the premises other than as security, and that he was not the owner of the wood and timber, and that the wood was cut by parties in the possession of the premises under a claim of title adverse to plaintiff. Under such circumstances, the alleged errors as to other matters are immaterial. Judgment affirmed.

COOK v. ROCHFORD.

No. 11,134; August 23, 1886.

12 Pac. 568.

Sale—Delivery—Attaching Creditors.—In an Action Against a Sheriff for the recovery of property attached by him as that of one C., where it is claimed that C. sold the property to plaintiff before the attachment, testimony of plaintiff and C. to the effect that on a day named prior to the attachment C. sold the property to plaintiff, taking his promissory note in payment, and gave him a bill of sale of the property, viz., saloon furniture and stock; that C. delivered to plaintiff the keys of the safe and the saloon, took his account-book, and left, and has had nothing to do with the business since, and that plaintiff has continued to own the property, and carry on the business, up to the time of the levy of the attachment; that there was but one advertisement in any paper authorized by C., and that was changed on the day of the sale by the insertion of plaintiff's name in the place of that of C.; that the advertisements that appeared in various other papers were not changed; that the sale was made in good faith; that the plaintiff was C.'s bar-tender at the time of the sale, and the business was conducted after the transfer just as it had been before, plaintiff continuing to tend bar; held, insufficient evidence of an immediate delivery and continued change of possession of the property in controversy.

APPEAL from Superior Court, Modoc County.
Replevin.

The complaint in this action alleges that the defendant is sheriff of Modoc county, California; that on the 1st of July, 1884, at Alturas, Modoc county, California, plaintiff was the owner and in the exclusive possession of certain saloon furniture, fixtures, and stock set out in the complaint; that the value of such goods was eleven hundred and nine dollars and seventy-five cents; that the defendant, as such sheriff, on the 1st of July, 1884, without the consent of plaintiff, took such goods from the plaintiff's possession; that before the commencement of this action, on July 2, 1884, plaintiff demanded of defendant possession and return to him of such goods, which defendant refused, and still refuses, to do. Defendant's answer denies that plaintiff was the owner or in

possession of the property; denies any damage to plaintiff; alleges that he, as sheriff of Modoc county, on July 1, 1884, levied upon and attached the property described in the complaint under process of court issued in the case of Sykes & Co. against Whiting & Culver; that the goods were the property of J. B. Culver, of the firm of Whiting & Culver; that any claim of title of plaintiff thereto, based upon any contract with said Culver, is fraudulent and void. There was a verdict and judgment for plaintiff. Motion for new trial by defendant denied by the court. Defendant appeals from the judgment, and from the order denying the motion for a new trial.

The testimony offered on behalf of plaintiff and defendant, respectively, is as follows:

W. D. Cook, having been duly sworn, testified as follows:

"I am the plaintiff. I am an unmarried man. I am twenty-four years of age. Have resided in the town of Alturas, in this county, for the past eighteen months. I had been laboring as a bar-keeper in the Branch saloon, in this town, during my residence here, up to about the twentieth day of November, 1883. Shortly after this I began laboring for John B. Culver, as bar-keeper in the Delta saloon, in this town, and continued so to labor for him until the twenty-sixth day of June, 1884, when I purchased of Culver all the property described in the complaint, and then took of him a written bill of sale therefor. Culver first proposed a sale to me of the property about the 1st of June, when I took the matter under advisement, and on the day we traded I approached him, and asked him if he was still willing to sell upon the terms he had offered. He answered that he was, and we closed the trade. No one was present at the sale other than Culver and myself. It was made at the saloon. The articles or property was not inventoried, nor in anywise examined or listed; but a lumping was made. I knew what there was in the saloon. Culver, a few hours after the sale, gave me a bill of sale, then took his account-books, and left. The purchase price was eleven hundred and eighty-three dollars. I had no property nor money whatever at the time I made the purchase. I bought the property on credit. I gave my individual, unsecured promissory notes to Culver for the purchase

money in part, and assumed, as between Culver and myself, only the payment of certain debts of Culver for the balance. I knew at the time of making the purchase that Culver was indebted to some parties in San Francisco for some of the stock on hand, but did not then know that he was indebted to E. Sykes & Co.

"As I have said, I assumed the payment of certain debts of Culver in San Francisco. I did not, in writing or otherwise, agree with Culver's creditors to pay these debts, but merely so contracted with Culver. Since this action was begun I have paid those debts so assumed, and also paid about all I owe Culver on the promissory notes. I made the purchase in good faith. I could make no money keeping bar, and I thought I could do no worse running the saloon on my own responsibility, was the reason I made the purchase. I did not know at the time I made the purchase that F. W. Ewing, attorney for E. Sikes & Co., was then endeavoring to collect their claim against Culver. Culver said nothing to me about it. The defendant, as sheriff, on the first day of July, 1884, levied upon and attached all of the property described in my complaint, and then took the same into his official custody, and so kept and detained the same continuously until the twenty-first day of that month. His taking was by virtue of a writ of attachment in the action then pending in the superior court of this county in favor of E. Sikes & Co. and against John B. Culver. At the time of the sale, nor at any other time thereafter, until attached, was anything done with reference to the property in controversy that would evidence to a person that there had been a change of ownership or possession thereof. The bar fixtures, and everything in the saloon, remained just the same, and I continued to tend the bar just the same as I had while laboring for Culver. On the same day that I purchased the property I went to the office of the 'Northern Picket,' a weekly newspaper published in town, and ordered Culver's name removed and my own inserted in the advertisement as the proprietor of the Delta saloon, which was done, and have had the advertisement in that paper ever since. Culver did not stop there after the sale, but would come around, and be in the saloon; but he and I were in the saloon, sitting there, when the defendant came in to make the attachment. Culver then

told the sheriff that he had sold out to me, but I did not say anything about it. I did not then, nor have I ever, shown him my bill of sale. I assisted the sheriff in making the inventory of the property. I did not make any demand upon the sheriff for the return of the property until the next day. The property in controversy was, at all times alleged, worth eleven hundred and nine dollars and seventy-five cents. I have been damaged one hundred dollars by defendant's keeping the said property from the time it was attached until the 21st of July, 1884. After I had made the purchase, and immediately thereafter, Culver gave me possession by handing me the keys of the door and safe, and, with a wave of his hand, said, 'There is the property,' or words of similar import. Culver then took his account-book and left, and has never had anything to do with it since, and from that time has had no interest in it, one way or another."

John B. Culver, sworn on behalf of plaintiff, testified as follows: "When I made a sale of the property in controversy to plaintiff I was indebted to E. Sikes & Co., of San Francisco, to the amount of three hundred and fifty dollars. I never have paid their claim, but I expect to as soon as I get able. I made the sale to Cook in good faith, and without any intention of defrauding E. Sikes & Co. The saloon building, and which I had rented, has been long known as the 'Delta Saloon,' and so advertised in various local newspapers, with myself as proprietor. There was but one of these advertisements, to wit, the one in the 'Northern Picket,' that was authorized by me. This advertisement was discontinued by me on the day of the sale. I have done nothing with reference to the other advertisements. At the time of the sale, nor at any time subsequently that I know of, was anything done to evidence the change of the possession of the property, other than that I took my accounts, and left the saloon, and gave plaintiff the keys thereto. When the sheriff made the attachment I told him the property belonged to Cook; that I had sold it to him five days before; and afterward Mr. Cook told him the same."

C. C. Rochford, being sworn, testified as follows: "I am the defendant herein. I attached the property in controversy in the Delta saloon, in this town, on the first day of July, 1884. The plaintiff and John B. Culver were both in

the saloon when I went into it and when I did make the attachment. I had been well acquainted with Culver and Cook when Culver was proprietor of the saloon and Cook his bartender; had been in the saloon very frequently during that time. When I made the attachment of the property in controversy I did not see or know anything that evidenced a change of possession or ownership thereof, excepting only that Culver told me, while making the levy, that he had sold to Cook. Cook did not say a word about it, but assisted me in making the levy. He did not claim the property until the next day. I placed a keeper in possession of the saloon, and, at plaintiff's request, conducted the business, selling for cash only; all receipts of which were turned over to plaintiff on July 21, 1884, when he gave a bond for the return of the property. After plaintiff demanded a return of the property, E. Sikes & Co. indemnified me by their attorney giving me his word that I should be saved from all expense for damages in the premises if I would hold the property, but no writing of indemnity was given me, nor have I any now."

J. S. Whiting was duly sworn on behalf of the defendant, whereupon defendant offered to prove by this witness that E. Sikes & Co., by their attorney, had presented and were pressing Culver for the payment of their claim on the day before the sale from Culver to Cook, and that Culver replied, asking for an extension of time for a few days, that he might hear from E. Sikes & Co.; to which plaintiff objected on the ground that such testimony would be incompetent, irrelevant, and immaterial. The court sustained the objection, and the defendant excepted.

J. J. May for plaintiff and respondent; Ewing & Claflin for defendant and appellant.

By the COURT.—The court below should have granted a new trial. The evidence was insufficient to show that there was an immediate delivery and continued change of possession of the property in controversy.

Judgment and order reversed and cause remanded for a new trial.

PORTER v. MURRAY.

No. 9384; August 24, 1886.

12 Pac. 425.

Forcible Entry and Detainer—Joining Wife of Principal Defendant—Describing Premises.—A complaint in an action of forcible entry and detainer is not obnoxious to a demurrer as not stating facts sufficient to constitute a cause of action which sets up the plaintiff's ownership of certain described premises, his possession thereof on a day named, the unlawful entry of the defendants thereon on that day, and their forcible detainer thereof up to the time of bringing the action. Nor is it demurrable for joining the wife of the principal defendant as a party defendant, nor because it sets out one cause of action in several distinct counts, and only describes the premises in the first one.[1]

Forcible Entry and Detainer—Stranger Entering Between Going Out of Tenant and Entry of Landlord.—In an action of forcible entry and detainer, where the testimony for plaintiff tends to show that on a certain day the plaintiff's agent received notice that plaintiff's tenant would vacate the premises on the following day; that on that day at 8:30 A. M., the agent was on hand to take charge of the premises, and was told by the tenant's wife that the tenant would not go out until 1:30 P. M. of that day; that at 12:30 P. M. the agent returned and found one of the defendants in the house, with the windows and doors barricaded, and threatening to shoot the agent if he attempted to enter—a motion for a nonsuit was properly denied.

Forcible Entry and Detainer—Findings.—Where, in such an action, that findings show that, on the day mentioned in the complaint, the plaintiff was in the peaceable possession of the premises; that on that day the defendants wrongfully entered thereon, and have ever since forcibly detained possession thereof from the plaintiff; and the facts thus found, together with the admissions contained in defendants' answer, make out a cause of action alleged in favor of the plain-

[1] **Cited** in the note in 121 Am. St. Rep. 371, on civil action for forcible entry and detainer.

Cited in Wilson v. Carson, 14 Cal. App. 572, 112 Pac. 736, and distinguished from that case in that in the latter forcible entry and detainer would not lie, the defendant having been in quiet possession for more than a year before the institution of proceedings.

tiff—it is no cause of complaint on the part of defendants that the court did not find the facts in as many ways as they were set out in the complaint.[2]

APPEAL from Superior Court of San Francisco.

Forcible entry and detainer.

This action was brought under the provisions of the California Code of Civil Procedure respecting forcible entries and unlawful detainers: Sec. 1159 et seq. The property is a small lot in San Francisco, California, and is the same property that was involved in the case of Murray v. Green, 64 Cal. 363. The complaint set out the one cause of action in four separate counts, to each of which a demurrer was interposed. One ground of demurrer to each count was that it did not state facts sufficient to constitute a cause of action. The second, third, and fourth counts were demurred to for uncertainty in not repeating the description of the land given in the first count. Each count was demurred to for the misjoinder of Mrs. Lawler as a defendant. The demurrer was overruled. Defendants answered, and a trial was had. Defendants' counsel made motions for a nonsuit on behalf of each defendant, which were all denied. Findings were filed, and judgment went for plaintiff. Defendants appealed from the judgment. Objection is made to the findings, because, of the four causes of action stated separately in the complaint, there are no findings as to any one of them, but the findings are a medley of some parts of them all.

A. L. Rhodes for plaintiff and respondent; Matt I. Sullivan and E. A. Lawrence for defendants and appellants.

ROSS, J.—The demurrer was properly overruled. The findings show that, on the day mentioned in the complaint, the plaintiff was in the peaceable possession of the property, and

[2] **Cited** in the note in 121 Am. St. Rep. 389, on civil action for forcible entry and detainer.

Cited in Ellis v. State, 124 Ga. 93, 52 S. E. 148, as authority for saying that by the departure of the tenant at the end of his term, the landlord is to be regarded as in possession, even though not going into actual occupancy.

that on that day, during his absence, Murray wrongfully entered thereon, and has ever since forcibly detained possession thereof from the plaintiff. As there was no omission to find upon any material fact set up by the defendants, and as the facts found by the court, together with the admissions contained in the answer, sustain a cause of action alleged in favor of the plaintiff, defendants have no just ground of complaint because the court did not find the facts in as many different forms as the plaintiff, out of abundant caution, thought it best to employ in the statement of his cause of action.

In respect to the defendants Lawler and wife, it appears from the pleadings that they entered under Murray, and, together with him, detain the possession of the property from the plaintiff.

The motion for nonsuit was properly refused. The testimony on the part of the plaintiff tended to show that on the afternoon of the 14th of August, plaintiff's agent received notice that the tenant of the plaintiff, who had occupied the premises for many months, would vacate the premises the following day; that plaintiff's agent went to the premises at 8:30 A. M. on the 15th, and was informed by the wife of the tenant that they would not move out before 1:30 that day; whereupon she was informed by the agent that at 12:30 he would be there to take charge of the premises, and promptly at that hour he was on hand, when he found Murray in the house, with the windows and doors barricaded, and threatening to shoot the agent if he attempted to enter. Manifestly, when the tenant quit, the landlord was restored to the possession. It would be a monstrous doctrine to affirm that the landlord does not get possession of the premises upon the expiration of his tenant's lease if some third party can slip in between the moving out of the tenant and the moving in of the landlord. Judgment affirmed.

We concur: Myrick, J.; McKinstry, J.

SHUMWAY v. LEAKEY.

No. 11,103; August 25, 1886.

11 Pac. 839.

New Trial—Conflict of Evidence.—A New Trial Asked for on the Ground of insufficiency of the evidence to sustain the verdict will be refused if the evidence is conflicting on every material point.

APPEAL from Superior Court, County of Lassen.

Action for the possession of goods, or their value, and for damages for their detention. The case was tried before a jury, and verdict rendered for defendant. Plaintiff moved for a new trial on the ground that the verdict was not justified by the evidence. The court denied the motion for a new trial on the ground that the record disclosed the fact that the evidence was conflicting on material issues, and that where such conflict exists the verdict of the jury ought not to be disturbed. From the order denying the new trial plaintiff appealed.

A. L. Shinn and J. D. Goodwin for appellant; E. V. Spencer for respondent.

By the COURT.—The evidence is conflicting on every material point. Therefore we can find no error in denying the motion for a new trial; nor do we find any error in the record.

Judgment and order affirmed.

DOTY v. WHITTLE.

No. 11,093; August 26, 1886.

11 Pac. 761.

New Trial—Appeal.—When the Discretion of the Judge Who Presided at the hearing of the motion for a new trial appears to have been fairly exercised, the supreme court will not condemn his action.

Eagon & Armstrong for appellant, Doty; A. C. Brown for respondent, Whittle.

FOOTE, C.—This is an appeal from an order granting a new trial. Judge Moore tried the cause, a jury being waived, and gave judgment for the plaintiff. A statement on motion for a new trial was settled by him, and afterward the motion was duly heard and granted by Judge Griffith. The order was clearly made on the ground that the evidence was insufficient to justify the decision.

The appellant contends that the statement on the motion for a new trial did not properly specify the particulars in which the evidence was alleged to be insufficient for such purpose. The action was for damages for an unlawful entry by the defendant on the plaintiff's land, and the digging thereon, without the latter's permission, of certain "post-holes." The main question of dispute on the trial was as to whether the land on which the holes were dug belonged to the former or the latter person, as their lands were adjoining, and the exact line which divided them was uncertain and in dispute. Such being the case, we think that the first specification of the insufficiency of the evidence to justify the decision unmistakably directed the attention of court and counsel to the particulars relied on by the moving party, to the end that the evidence bearing on such specification might be inserted in the statement, and considered by the judge. Such evidence was inserted in the statement, and it had direct pertinency to the issue raised by the pleadings. The discretion of the judge who presided on the hearing of the motion was, we think, fairly and properly exercised. When that appears to be the case, this court does not condemn such action: Gerold v. Brunswick & B. Co., 67 Cal. 124, 7 Pac. 306, and cases there cited.

The order should be affirmed.

We concur: Belcher, C. C.; Searls, C.

By the COURT.—For the reasons given in the foregoing opinion the order is affirmed.

ARNOT and Others v. BAIRD.

No. 11,200; August 27, 1886.

12 Pac. 386.

Mortgage — Deed Absolute — Foreclosure—Pleading.—In an action to declare a deed absolute in form a mortgage, and sell the property conveyed thereby to satisfy certain notes described in the complaint, where the complaint states that the notes were made payable to parties named, and that a subsequent deed of trust reciting the former deed was made to secure the payment of the amount thereof, and the deed, which is set out in the complaint, states that it was given to secure the payment thereof, the allegations as to the making and delivery of the notes are sufficient to sustain a decree of foreclosure and sale.

APPEAL from Superior Court, Sierra County.

Action to have an absolute deed declared a mortgage, and have the property sold to satisfy certain notes described in the complaint.

Van Clief & Wehe for respondents, Arnot and others; Cross & Simonds for appellant, Baird.

By the COURT.—Appeal from judgment. If the recital of facts contained in the decree is not to be treated as a finding of facts, it will be deemed that findings were waived. If the recital is to be treated as a finding of facts, the facts were therein sufficiently found to sustain the decree. There is no bill of exceptions; and it does not in any manner appear that findings of fact were not waived. It may be that findings were waived, and therefore the statement of facts in the decree may be treated as a useless statement. If findings were waived, the statement of facts in the decree would not necessarily show error.

The complaint states that the notes were made by the defendant, and were made to the parties respectively; and that the deed of trust was made to secure the payment of the amounts thereof; also the deed of trust (set out in the complaint) states that it was given to secure the payment of the

amounts of the various notes. We think there are sufficient allegations as to the making and delivery of the notes: Hook v. White, 36 Cal. 300.

Judgment affirmed.

MONTGOMERY v. LOCKE and Another.*

No. 9740; August 30, 1886.

11 Pac. 874.

Waters—Levee—Damage to Property.—Where the Effect of a Levee constructed by the defendant was to retain upon the land of the plaintiff, longer than it would otherwise have remained, the accumulated water of floods, and his property was injured thereby, the defendant was held liable for damages.

Damages—Necessity of Specially Pleading.—In Ordinary Actions of Tort, it is unnecessary to state specifically, and in amounts, the different statements or items which go to make up the sum total of the damages; it is enough to state the facts constituting the cause of action, and claim as much in gross, as damage for the wrong done.

Special Damages — Pleading — Evidence.—If Special Damages are Claimed, the facts establishing such special damages must be stated with particularity, in order that the defendant may be enabled to meet the charge if it be false, and, if not so stated, cannot be given in evidence.

J. O. Campbell and F. T. Baldwin for respondent, Montgomery; Byers & Elliott and W. L. Dudley for appellants, Locke and another.

SEARLS, C.—This is an action to recover damages for injury to the land of the plaintiff by construction of levees, which are claimed to have obstructed the natural flow of water, and for a judgment that the levees, dams and embankments of defendants be abated as a nuisance. Plaintiff had a verdict as follows: "We, the jury in the above-entitled cause, find for the plaintiff in the sum of fifteen hundred ($1,500) dollars, caused by the repair and maintenance of levee No. one (1) by the defendants." Plaintiff thereupon waived all right

*For subsequent opinion in bank, see 72 Cal. 75, 13 Pac. 401.

to a decree abating the nuisance complained of, and judgment was rendered in his favor on the verdict for fifteen hundred dollars, and costs. Defendants appeal from the judgment and from an order denying a new trial.

Plaintiff is the owner of certain lands lying and being on and near the Mokelumne river. Defendant Holman owns land below and west of and adjoining that of plaintiff, and defendant Locke owns land still west of that of Holman. The land of plaintiff has a gentle slope to the southwest. A slough puts out of the river near the northeast corner of plaintiff's land, passes through it in a general southwesterly direction, having some branches and lateral sloughs, and passes off upon the land of defendant Holman, thence through that of defendant Locke, and unites with the Mokelumne river again at a point above Staples' Ferry. In times of flood a portion of the water from the river and the surface water from the adjacent lands flow into and through the slough.

In 1879 and 1880 the defendants built a levee upon the land of Holman, commencing near the lower end, near the southeast corner of plaintiff's land, and running thence, near the dividing line between the land of plaintiff and Holman, in a westerly and southerly direction, by which the main slough above mentioned was closed up and water prevented from passing down through it. This is the levee No. 1 referred to in the evidence and verdict of the jury. The tendency of this levee was to hold the water and back it on the land of plaintiff.

In April, 1880, there occurred a flood of short duration, which it is claimed was retained upon the land of plaintiff by levee No. 1 until it gave way. It was repaired by defendants, and a few weeks later a second flood occurred, which involved the whole vicinity, and continued for weeks.

There was testimony tending to show that the effect of levee No. 1 was to retain upon the land of plaintiff, longer than it would otherwise have remained, the accumulated water of this last flood, and that the effect of the standing water was to injure his alfalfa, fruit trees and vines.

The instructions of the court to the jury were quite as favorable to the defendants as the law will warrant; and of the exceptions taken during the progress of the trial it is sufficient to say the errors relied upon are for the most part without

merit, and, where otherwise, are not of sufficient importance to warrant a reversal of the judgment.

The objection to the statement, because not settled in time, is not supported by any such statement or bill of exceptions embodying the facts as will warrant us in the conclusion that the court below erred in overruling the objections of respondent to the settlement.

The demurrer to plaintiff's complaint was properly overruled. Each count of the complaint stated facts sufficient to constitute a cause of action against defendants. In ordinary actions of tort, it is unnecessary to state specifically, and in amounts, the different statements or items which go to make up the sum total of the damages. It is enough to state the facts constituting the cause of action, and claim as much in gross, as damages for the wrong done: Shepard v. Pratt, 16 Kan. 209. If special damages are claimed, the facts establishing such special damages must be stated with particularity in order that the defendant may be enabled to meet the charge if it be false, and, if not so stated, cannot be given in evidence: 1 Chitty on Pleading, 15th Am. ed., 414.

We find no error in the judgment-roll, and are of opinion the judgment and order appealed from should be affirmed.

We concur: Belcher, C. C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

WEIDEKIND v. TUOLUMNE CO. WATER CO.

No. 11,446; August 31, 1886.

12 Pac. 387.

Waters—Negligence of Water Company in Repairing Dam.—The evidence in this case failed to show that defendant, a water company, had not used proper care in repairing its dam, the breaking of which injured plaintiff's mining claim, and washed away his tools; and the judgment in plaintiff's favor for damages was reversed, and a new trial ordered.

APPEAL from Superior Court, Tuolumne County.

Action against a water company to recover damages for the filling up plaintiff's mining claim, and the washing away of his tools, etc., by the breaking of the company's dam, owing to its negligence in not keeping it in proper repair. Verdict and judgment for plaintiff. Defendant appeals.

Frank W. Street for appellant; E. A. Rodgers for respondent.

By the COURT.—The verdict is not sustained by the evidence. The instructions given show no error.

Judgment and order reversed and cause remanded for a new trial.

AYLESWORTH v. DEAN.

No. 11,327; August 28, 1886.

12 Pac. 241.

An Assignment for the Benefit of Creditors, That is Shown not to Include All of the debtor's property, will be held void, unless it is further shown that the omitted property is exempt from execution.

APPEAL from Superior Court, County of Plumas.

Plaintiff is the assignee of Tremain & Co., for the benefit of their creditors, and brings this action against defendant, as sheriff, for the recovery of property alleged to have been wrongfully taken from his possession, as such assignee, in pursuance of an attachment against Tremain & Co. Defendant claims that the assignment is invalid because it does not include all of the assignor's property. It seems that all of the debtor's property is not, in fact, included in the assignment, but plaintiff claims that such as is omitted is exempt by law. The findings show that the assignment does not include all of the property, but do not show that the omitted property is exempt. Judgment for plaintiff. Defendant ap-

peals, assigning as error the insufficiency of such finding to sustain the judgment.

A. L. Shinn, E. T. Hogan and W. W. Kellogg for defendant and appellant; R. H. F. Variel and M. Ball for plaintiff and respondent.

By the COURT.—It does not appear from the findings that the property omitted from the assignment was in fact exempt from execution.

Judgment reversed and cause remanded.

JUDKINS v. ELLIOTT.

No. 9975; August 30, 1886.

12 Pac. 116.

Waters.—An Appropriator of Water on United States Public Lands is Entitled to the use of the same, as against one who subsequently acquires title to the land from the government.[1]

APPEAL from Superior Court, County of Sierra.

Action for damages for diversion of water to the use of which the plaintiff claimed to be entitled, and for an injunction against further use of the water by defendant. It appears that plaintiff had appropriated water upon the public lands of the United States before any private claim to the land had been made. Defendant subsequently acquired title to the land upon which the water rose, and through which it flowed to plaintiff's lands, and diverted the same, to plaintiff's injury.

[1] **Cited** in De Necochea v. Curtis, 80 Cal. 407, 20 Pac. 565, an action to restrain the defendant from diverting the water flowing to and upon the plaintiff's land, as holding that rights to water, acquired by appropriation after the passage of the act of 1866, were valid and entitled to protection against subsequent acquirers of land titles from the government.

Cited, in passing, by the court in Crawford v. Hathaway, 67 Neb. 365, 108 Am. St. Rep. 644, 93 N. W. 794, 60 L. R. A. 889, in an opinion that goes elaborately into the question in all its branches.

M. Farley and R. H. Lindsay for appellant; Van Clief & Wehe for respondent.

By the COURT.—The case shows that the water in controversy, while situate upon public land of the United States, was appropriated by the plaintiff prior to acquisition by defendant of any right or title from the government to the land upon which the water is situate.

Judgment and order affirmed.

KETCHUM v. BARBER.

No. 11,423; August 31, 1886.

12 Pac. 251.

Deed—Description of Grantee.—A Deed to Henry Stull & Co. vests the legal title in Henry Stull alone, and his deed will give to his grantee a good and valid title.

Ejectment—Proof of Ouster—Admissions in Pleadings.—In ejectment, if the defendant in his answer admits acts amounting to an ouster, but denies plaintiff's title or right to possession, plaintiff is not bound to prove ouster, and, if he prove title and right to possession in himself, is entitled to recover.

APPEAL from Superior Court, County of Amador.

Ejectment for possession of a certain mining and water ditch running across defendant's lands. Plaintiff claimed title through one Henry Stull, who in turn derived, or claimed to derive, title from defendant by virtue of a deed made to Henry Stull & Co. Defendant in his answer admitted having given to Stull & Co., a right to dig and maintain the ditch, but claimed that it had been abandoned, and admitted that hence he had re-entered upon and used the ditch continuously to the time of trial. On the trial, plaintiff, to make out his title, introduced the deed to Stull & Co., in evidence, and also put in evidence the deed from Stull to himself, and proved by witnesses the possession thereunder of himself and Stull, and closed. Defendant moved for a nonsuit on the

ground that plaintiff had neither proven title nor possession in himself, nor ouster by defendant. The nonsuit was granted and plaintiff appealed.

Eagon & Armstrong for plaintiff and appellant; McGee & Farnsworth for defendant and respondent.

By the COURT.—The nonsuit was improperly granted. The deed to Henry Stull & Co. vested the title in Henry Stull: Winter v. Stock, 29 Cal. 411, 412, 89 Am. Dec. 57. The answer shows a sufficient ouster.

Judgment reversed and cause remanded for a new trial.

BUTTE CO. v. BOYDSTUN.

No. 11,523; August 31, 1886.

11 Pac. 781.

Road—Authority of Supervisors—Province of Court.—Where the question of the necessity of taking land for a road was settled by a board of supervisors, it is not a question for the court to pass on.[1]

J. C. Gray, F. C. Lusk and Hundley & Gale for respondent, Butte Co.; T. B. Reardon & Son for appellant, Boydstun.

By the COURT.—There was no misjoinder of parties defendant. The complaint was sufficient. There was no error in striking out that portion of defendant's, Boydstun's, answer, which attempted to raise an issue as to the necessity of taking the land for the road. The question of necessity is settled by the board of supervisors, and, having so determined, it is not a question for the court to pass on: Tehama Co. v. Bryan, 68 Cal. 57, 8 Pac. 673.

Judgment affirmed.

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[1] Cited and approved in City of Santa Ana v. Harlin, 99 Cal. 540, 34 Pac. 225, the court saying that "the action of the council is final and conclusive of the necessity of the improvement, and the courts may not adjudicate the question of such necessity" in condemnation proceedings.

CHIELOVICH v. KRAUSS.

No. 11,007; September 1, 1886.

11 Pac. 781.

Intervention.—A Plaintiff's Demurrer to an Intervention Should have Been Sustained when the intervention did not allege facts showing that the judgment was unjust, or facts showing that the defendant in the case had a defense to that action.[1]

Mortgage—Redemption—Tender.—Under the California Civil Code, an offer to pay by one who seeks to redeem from a mortgage must be made with intent to extinguish the obligation.[2]

Charles L. Queer and Ball & Craig for appellant, Chielovich; W. B. Treadwell and Grove L. Johnson for respondent, Krauss.

By the COURT.—Plaintiff's demurrer to the intervention should have been sustained. The intervention does not allege facts which show that the judgment was unjust, or facts showing that the defendant in Chielovich v. Roth had a defense to that action. The statement that he pleaded a defense which he was advised by counsel was good, and which he believed to be good, was not sufficient.

The mode of offering to perform prescribed in the chapter of the Civil Code headed "Offer of Performance" (section 1485 et seq.) applies as well to offers of performance which operate a redemption (Civil Code, section 2905) as to other offers to perform. Such offers must be made with "intent to extinguish the obligation," since the lien can be extinguished only by extinguishing the obligation. Section 1500 provides that an obligation to pay money is extinguished by a due offer of payment "if the amount is immediately deposited in bank," etc. It follows that an offer to pay by one who seeks to redeem from a mortgage must be made in the same way.

[1] Cited in the note in 123 Am. St. Rep. 291, on intervention.

[2] Cited and approved in San Pedro Lumber Co. v. Reynolds, 121 Cal. 91, 53 Pac. 416, where the tender, the court says, was not made in compliance with the law, it being of pledged stock and, besides, for an amount less than that due.

When Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145, was decided, there was no New York statute which prescribed the mode in which an offer to perform must be made.

Neither plaintiff nor intervener was entitled to any relief in this action.

Judgment reversed and cause remanded.

Myrick, J., dissenting.

PEOPLE v. BROWN and Another.

No. 20,177; September 1, 1886.

13 Pac. 222.

Jury—Challenge.—No Exception Lies to a Ruling denying a challenge to a juror for actual cause.

Evidence—Medical Expert—Person's Ability to Make Affidavit.—Upon trial of an indictment for preparing a false affidavit, held proper to ask medical experts whether the person making the affidavit, who was ill at the date thereof, was at the time able to make such a statement as appeared in the affidavit.

APPEAL from Superior Court, San Francisco.

Defendants were informed against, under section 134, Penal Code, for the crime of preparing a false affidavit, to be used on the hearing of a motion for new trial in the case of Sharon v. Sharon, then pending in superior court, San Francisco. They were convicted. Defendant Brown was a notary public, and the affiant, one Isabella Clark, was a patient in the almshouse of the city and county of San Francisco. The affidavit was prepared by an attorney here, and Brown was requested by the attorney to go to the almshouse, and get Mrs. Clark to sign and swear to it. Mrs. Weile (defendant) went with Brown. The question asked Dr. Geary is: "Was she [Mrs. Clark] at that time able to make such a statement of things past and present as appears in this affidavit?" To Dr. Ayer: "From your personal examination of her while living, and from your examination of her brain when she died, whether

in your opinion this woman, upon the 18th of May, 1885 [when the affidavit was made], could have made this statement of facts and dates as appears in this affidavit, or could have comprehended them, if questioned or if spoken to her or read to her?"

Tyler & Tyler for appellants; Attorney General for respondent.

By the COURT.—We have examined the points presented on behalf of the appellants, and we find no error in the rulings of the court below, nor in the instructions. The court did not err in denying the challenges to jurors. They were challenged for actual bias, and no exception is by law allowed on such ruling: Pen. Code, sec. 1170; People v. Cotta, 49 Cal. 166; People v. Vasquez, 49 Cal. 560; People v. Taing, 53 Cal. 602; People v. Riley, 65 Cal. 107, 3 Pac. 413. The court did not err in its ruling permitting the questions objected to to be put to Drs. Geary and Ayer. The court did not err in its ruling admitting in evidence the deposition of Sharon: People v. Cunningham, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 703, 846. In the instructions given by the court we find no error. They fairly presented the law to the jury. There was no error in the instructions asked by defendants and refused.

Judgment and order affirmed.

WHITTLE v. DOTY.

No. 11,170; August 31, 1886.

12 Pac. 299.

Appeal—Findings not Contradictory—Material Issues Covered. Where, on appeal from a judgment in a cause tried by the court without a jury, the findings are not contradictory, and cover all the material issues presented therein, the judgment of the trial court must be affirmed.

APPEAL from Superior Court, Amador County.

The plaintiff in his complaint, for a second cause of action, which is the one considered on this appeal, alleged that he

was the owner in fee of the southwest quarter of the northwest quarter of section 23, in township No. 7 north of range No. 9 east, Mount Diablo base and meridian, situated in the county of Amador and state of California. The defendant answered, and claimed an interest adversely to the plaintiff in and to the following portion of said land, to wit: Commencing at the northwest corner of said subdivision, and running thence east, along the northern boundary thereof, to the northeast corner thereof; thence south, about nine and one-half rods, to a fence crossing said subdivision from east to west; thence west eighty rods, along said fence, to the western boundary of said subdivision; thence north seven and one-half rods, to the place of beginning—said piece of land containing four and one-quarter acres more or less. The plaintiff claimed that the claim of the defendant was without right, and prayed that he might be enjoined from asserting any claim whatever to the premises adverse to himself. The case was tried by the court without a jury, and, in accordance with its findings of facts, entered a judgment for the plaintiff, quieting in him the title to the land, and restraining the defendant from setting up any claim thereto. The defendant contended that the findings were contradictory, and failed to cover the material issues; but the court entered up its judgment, and defendant appealed.

Eagon & Armstrong for appellant, Doty; Blanchard & Swisler for respondent, Whittle.

By the COURT.—The findings are not contradictory, and they cover all the material issues. Judgment affirmed.

STATE v. FOLSOM WATER CO.

No. 11,174; September 15, 1886.

12 Pac. 388.

Deed — Construction — Condition—Canal — Water Company.— Deed construed, and held not to impose on defendant water company the obligation to complete a certain canal named therein.

APPEAL from Superior Court, Sacramento County.

Action by the state of California to compel the Folsom Water Company, as assignee of the Natoma Water & Mining Company, to construct a certain canal according to the terms and conditions of a deed executed by the latter company to the state, in words as follows:

"This indenture, made this thirtieth day of June, Anno Domini eighteen hundred and sixty-eight, between the Natoma Water & Mining Company, a corporation, duly incorporated under and by virtue of the laws of the State of California, and having its principal place of business in the village of Folsom, in said state, party of the first part, and the State of California, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States, to it in hand paid by the second party, receipt whereof is hereby acknowledged, and in further consideration of fifteen thousand dollars ($15,000) in convict labor, rated at fifty cents per diem, to be furnished to said first party in aid of its water-power canal enterprise, by said party of the second part, but only at the convenience of the state, and whenever it may be deemed advisable and judicious by the board of state prison directors of said state, has granted, bargained, sold, conveyed, and confirmed, and by these presents does grant, bargain, sell, convey, and confirm, unto the said state of California, forever, all that certain piece or parcel of land situate, lying, and being in Granite township, Sacramento county, state of California, and being a portion of the larger tract patented by the United States government under the name of 'Rancho Rio de los Americanos'; the portion thereof herein conveyed

being particularly and specifically described as follows, to wit: Beginning at a point on the east boundary line of said rancho, fifteen feet from where said line, projected northwardly, intersects the American river at high-water mark; thence, along said east boundary of said rancho, south seventy-five (75) chains and fifty (50) links, to a point; thence, at a right angle west, to a point within ten feet of the eastern line of the water canal of the Natoma Water & Mining Company, which said canal is near the eastern bank of the American river; thence northerly, along said canal and ten feet from the eastern line thereof, to a point ten feet above the dam across said American river constructed by and belonging to said Natoma Water & Mining Company; thence, at a right angle westerly, to a point fifteen (15) feet above the American river at high-water mark; thence, along said river, northeasterly, following its meanderings on a line fifteen feet above high-water mark, to the place of beginning,—containing three hundred and fifty (350) acres of land; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, with the timber standing thereon, and the granite quarries contained therein, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances; also the exclusive right forever to the use of the first fall five feet perpendicular of the whole water of the canal at the upper end of that place on the canal known as 'Prison Yard,' with all rights, privileges, and easements necessary for the taking and enjoyment of power from said fall; it being understood that the said party of the first part reserves to itself the subsequent power resulting from the flow of water in said canal after the first fall as aforesaid, and that this instrument is not to be construed as granting unto said state the right to divert said water, or any material quantity thereof, permanently from said canal. To have and to hold all and singular the above mentioned and described premises, together with the appur-

tenances, unto the said state of California, forever. And the said party of the first part warrants the said premises to be free from all and every incumbrance of any kind, character, or description, and against any and all incumbrances now existing upon said premises, created or suffered by said party, or by any other party, will forever warrant and defend. But, in accordance with the resolutions upon the branch state prison location passed by the board of state prison directors on the eighteenth day of June, A. D. 1868, the above grant of water-power is upon condition always that said board of state prison directors do furnish and supply, at such times and in such manner as it may deem advisable and judicious, fifteen thousand dollars in convict labor, rated at fifty cents per diem for each convict employed, unto said first party, in aid and construction of its water-power canal and adjuncts now partially completed along the western line of the lands heretofore described, or so much of the same as may suffice for the completion of dam and canal down to the point of delivering the said water-power, at the upper part of prison yard, as already mentioned.

"In witness whereof, the president and secretary of the said Natoma Water & Mining Company, acting for said company under and by virtue of a resolution passed by the board of trustees of said company, at a regular meeting thereof holden at Folsom on the thirtieth day of April, A. D. eighteen hundred and sixty-eight, which said resolution is in the following words, to wit: 'Resolved, that the committee on prison site be also authorized to make all arrangements with the board of state prison directors for the location of a branch prison upon the company's property; and the president and secretary are hereby empowered and directed to execute, on behalf of this company, any and all deeds and agreements to and with said board of state prison directors on behalf of the state of California, as shall be agreed to between the said board and this company's committee on prison site,'—which resolution still stands as an order of said board of trustees upon the books of said company, unrevoked and unrepealed,—have hereunto set their hands and seals, the said Natoma Water & Mining Company having no corporation seal, on the day and year first above written.

"The word 'Rio' is interlined between the fourth and fifth lines of the second page, before signing.

[Seal] "HORATIO G. LIVERMORE,
"President of the Natoma Water & Mining Co.

[Seal] "ROGER S. DAY,
"Secretary of the Natoma Water & Mining Co."

Defendant demurred to the complaint; and, the demurrer being sustained, the state appealed.

E. C. Marshall, attorney general, and W. B. Treadwell for appellant; A. P. Catlin for respondent.

By the COURT.—We are of opinion that the deed from the Natoma Water & Mining Company to the state did not impose an obligation upon the company to proceed to the completion of the canal. Therefore the ruling of the court below on the demurrer was correct. Judgment affirmed.

PORTEOUS v. REED.

No. 9967; September 16, 1886.

12 Pac. 117.

Statute of Limitations.—Failure to Find upon the Issue of the Statute of limitations is ground for reversal of the judgment.

APPEAL from Superior Court, County of Calaveras.

Ira H. Reed and D. M. Seaton for appellant; Reddick & Solinsky for respondent.

Per CURIAM.—Ejectment. The defendants pleaded the statute of limitations. The findings fail to respond to this issue. The judgment is reversed and cause remanded.

LOCEY v. AMERICAN CENTRAL INS. CO. LOCEY v. PACIFIC FIRE INS. CO. LOCEY v. HARTFORD FIRE INS. CO.

No. 11,548; September 16, 1886.

11 Pac. 791.

Fire Insurance—Waiver of Other Insurance.—Evidence held to show a waiver of notice of other insurance, or any act working an estoppel from asserting want of such notice, on defendants' part.[1]

These were actions brought by the appellant to recover on fire insurance policies issued by the respondents, who set up as a defense that the plaintiff had insured his premises in more than one company without consent.

Freeman, Johnson & Bates for plaintiff and appellant; T. C. Van Ness and Gray & Haven for defendants and respondents.

By the COURT.—These three cases are embraced within one appeal. The court below was justified in granting the nonsuits. The evidence failed to show a waiver by the defendants of notice of other insurance, and failed to show any act by which the defendants would be estopped from asserting want of such notice. The orders denying motion for new trial are affirmed.

[1] **Cited** and followed in Holbrook v. Baloise Fire Ins. Co., 117 Cal 567, 49 Pac. 557, where the court say: "The insured having procured further insurance without the consent of the insurer, the policy sued on became void, in virtue of the express provision for such result."

CAHEN and Others v. MAHONEY.

No. 9850; September 16, 1886.

12 Pac. 300.

Attachment — Dissolution — Affidavits — Counter-affidavits.— Where, upon a motion to dissolve an attachment, the counter-affidavits of the defendant are fully answered by the affidavits produced in behalf of plaintiffs, the court has no right to disregard or discredit the showing on behalf of plaintiffs, and, on appeal, the order dissolving the attachment will be reversed.

Attachment—Dissolution.—The Undertaking in This Case executed by the plaintiffs examined, and held to be sufficient.

APPEAL from Superior Court, Stanislaus County.

This was an attachment sued out by the plaintiffs against the defendant upon an alleged indebtedness. The affidavit required by law was made and filed in the cause, and an undertaking was executed by the plaintiffs in the following words:

"Whereas, the above-named plaintiffs have commenced, or are about to commence, an action in the superior court of the county of Stanislaus, state of California, against the above-named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiffs by the said defendant the sum of seven hundred and fourteen and 57-100 dollars of the United States, besides interest, and are about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein, now, therefore, we, the undersigned, residents of the said county of Stanislaus, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake, in the sum of five hundred dollars, and promise to the effect, that if the said defendant recovers judgment in said action, the said plaintiffs will pay all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of the said attachment, not exceeding the sum of five hundred dollars.

"Dated the twenty-sixth day of September, 1884.

[Signed] "C. A. STONESIFER. [Seal]

"J. C. TRANER." [Seal]

The justification and verification were as follows:

"C. A. Stonesifer and J. C. Traner, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says that he is a resident and free, state of California, and is worth the sum in said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

[Signed] "C. A. STONESIFER.
"J. C. TRANER.

"Subscribed and sworn to before me this twenty-sixth day of September, 1884.

[Signed] "WM. O. MINOR.
"Notary Public."

Affidavits and counter-affidavits were filed by both plaintiffs and defendant in support of their respective claims and defenses; and at the November term, 1884, the defendant moved the court to dissolve the attachment on several grounds; among them, that no sufficient or proper undertaking was made or filed, and that the pretended undertaking was not properly verified or justified. The court below dissolved the attachment, and from this judgment plaintiffs appealed.

C. A. Stonesifer and William O. Minor for appellants, Cahen and others; Stanton L. Carter for respondent, Mahoney.

By the COURT.—The court erred in dissolving the attachment in this case. The affidavit of the defendant was fully answered by the affidavits produced on behalf of plaintiffs. The court had no right to disregard or discredit the showing on behalf of plaintiffs. The undertaking was sufficient. Order reversed.

COOK v. McKINNEY.

No. 11,242; September, 1886.

11 Pac. 799.

Adverse Possession—Parol Evidence.—A Defendant in an Action of Ejectment, who had been for some twenty years in continued adverse possession of a strip of land adjoining his lot, successfully pleaded the statute of limitations against one who held the paper title to said strip; the defendant being permitted to prove by parol the continued occupation of the land in controversy by himself and the grantors of his lot.

Grove L. Johnson for appellant, Cook; Young, Young & Dunn for respondent, McKinney.

By the COURT.—Ejectment. The defendant pleaded the statute of limitations. The land in controversy is a strip of land, about two and one-half feet wide, of lot 8, adjoining the west half of lot 7. The plaintiff proved paper title to lot 8. The defendant proved paper title to the west half of lot 7, and gave evidence tending to show that he and his grantors of the said west half of lot 7 had been in the continued adverse possession of the strip for some twenty years. The court below found in favor of defendant. It was competent for the defendant to prove by parol the continued occupation of the strip by himself and his grantors of the west half of lot 7: Sedg. & W. Trial Title Land, 537. There is evidence to sustain the findings as to adverse possession.

Judgment and order affirmed.

LOCEY v. AMERICAN CENT. INS. CO. SAME v. PACIFIC FIRE INS. CO. SAME v. HARTFORD FIRE INS. CO.

No. 11,548; September 16, 1886.

11 Pac. 791.

Fire Insurance—Other Insurance—Waiver of Notice.—Evidence held to fail to show a waiver of notice of other insurance, or any act working an estoppel from asserting want of such notice, on defendants' part.

These were actions brought by the appellant to recover on certain fire insurance policies issued by the respondents. The respondents set up as a defense that the plaintiff had, in violation of the terms of his policies, insured his premises in more than one company, without consent.

Grove L. Johnson and Freeman, Johnson & Bates for plaintiff and appellant; T. C. Van Ness and Gray & Haven for defendants and respondents.

By the COURT.—These three cases are embraced within one appeal. The court below was justified in granting the nonsuits. The evidence failed to show a waiver by the defendants of notice of other insurance and failed to show any act by which the defendants would be estopped from asserting want of such notice.

The orders denying motions for new trial are affirmed.

WILLIAMS v. SOUTHERN PAC. R. CO.*

No. 9272; September 24, 1886.

11 Pac. 849.

Railroad — Contributory Negligence in Sleeping on Track.—When one goes upon a railroad, and lies down and goes to sleep in such a position as to be injured by a passing train, and is unseen by the officers in charge of the train, although they exercised ordinary care and diligence, held, that the railroad company is not liable.

Thornton, J., dissents.

*For subsequent opinion in bank, see 72 Cal. 120, 13 Pac. 40.

D. M. Delmas for respondent, Williams; S. F. Geil and H. V. Moorehouse for appellant, Southern Pac. R. Co.

ROSS, J.—The plaintiff, being intoxicated, lay down by the side of the defendant's railroad track, at a point within its right of way, about a mile distant from Salinas, in Monterey county, and went to sleep; and while lying there in that condition had one of his feet so crushed by the engine of the defendant's south-bound passenger train as to require amputation. The train was on time, and was running at its usual speed of from eighteen to twenty miles per hour. At the conclusion of the plaintiff's case a motion for nonsuit was made on behalf of the defendant, which the court below refused to grant; and a verdict having been subsequently returned for the plaintiff, the defendant moved for a new trial, which was denied.

An attentive examination of the record satisfies us that in both respects the court below was in error. There can be no sort of doubt that the act of the plaintiff in voluntarily going within the defendant's right of way, and lying down and going to sleep by the side of the track, in such a position that a passing train must strike him, was gross negligence. It is not easy to conceive of any that would be grosser. The case shows beyond question that that act on the part of plaintiff was the direct, proximate cause of his injury. Of course, notwithstanding the negligence of plaintiff and the fact that he was a trespasser upon the defendant's right of way, defendant would clearly be liable for any wanton or willful injury to him. As was well said by Mr. Justice McKee, in Tennenbrock v. Southern Pac. C. R. Co., 59 Cal. 270: "The mere fact that persons are wrongfully traveling on a railroad, afoot or on horseback, does not authorize officers of the company in charge of a train to run down such persons, or to wantonly inflict injuries upon them. If persons in that position are seen in time to avoid danger by warning them off by proper signals, such as ringing a bell or sounding a whistle, or slowing down, or stopping their train, it is the duty of the officers to resort to such means to prevent injury to the life or limb even of wrongdoers. The duty arises out of the circumstances of the situation, and it is as imperative upon them as any other

duty. But if persons in that situation are unseen by the officers in charge of a train until too late, in the exercise of ordinary care and diligence appropriate to the duties which they have to perform for their employers, to prevent injuries to others, or to resort to any means in their power for that purpose, the company is not liable."

There is nothing in the evidence in the present case tending to show that the officers of the defendant's train were guilty of any wanton or willful act toward the plaintiff, and even if it could be held that the evidence tended to show negligence on the part of those in charge of the train, yet in view of the fact that the evidence shows, without any conflict, that the plaintiff's own gross negligence directly contributed to the injury, we cannot sustain the judgment appealed from without overturning the rule with respect to contributory negligence, long established, and many times announced in this state in the cases, among others, of Needham v. San Francisco & S. J. R. Co., 37 Cal. 419; Flemming v. Western Pac. R. Co., 49 Cal. 253; Robinson v. Western Pac. R. Co., 48 Cal. 409, 421; Nehrbas v. Central Pac. R. Co., 62 Cal. 320.

The case of Meeks v. Southern Pac. R. Co., 56 Cal. 513, 38 Am. Rep. 67, referred to and relied on by counsel for respondent, does not sustain his position, nor at all conflict with the doctrine of the cases above cited. In that case it was held that the evidence was sufficient to sustain the verdict of the jury to the effect that there was no contributory negligence on the part of the plaintiff, and that there was negligence on the part of the defendant. The plaintiff in that case was a child of tender years, and got upon the railroad track without the permission or knowledge of his parents, and was there prostrated by illness. In that condition he was injured by a passing train. Under such circumstances neither the child nor his parents could be fairly held guilty of contributory negligence.

Judgment and order reversed and cause remanded for a new trial.

We concur: Morrison, C. J.; Myrick, J.; McKee, J.; McKinstry, J.

THORNTON, J.—I dissent. I think there was evidence in the case on the question of negligence of defendant, and con-

tributory negligence of plaintiff, which should have been submitted to the jury. This was done by the court below, and there was no error in so doing. The opinion of the majority in this case is in conflict with the judgments of this court in Shafter v. Evans, 53 Cal. 33, Chidester v. Consolidated Ditch Co., 59 Cal. 197, McKeever v. Market St. R. Co., 59 Cal. 300, and Fernandes v. Sacramento City Ry. Co., 52 Cal. 45. See, also, New England Glass Co. v. Lovell, 7 Cush. (Mass.) 321, and Railroad Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745. These cases hold that on questions of negligence (and in this I include contributory negligence, which denotes negligence on the part of the plaintiff) the jury are not only to find the facts, but such inferences as follow from them. The question only becomes one of law when the facts proved are such that men of ordinary judgment and intelligence must all agree that they show negligence. The facts in this case are not of that character, for they tend to show that the engineer in charge of the train could, if he had discharged his duty, have seen the plaintiff lying on the track. It makes no difference that the engineer testified that he was looking, and did not see plaintiff. His credibility was a question for the jury. The judgment in this case is a new departure, which must result in great embarrassment to this court whenever it is invoked as authority.

CRAMER v. TITTLE.*

No. 11,723; September 24, 1886.

11 Pac. 852.

Appeal—Corporation as Surety—Constitutionality of Statute.—Under article 4, section 25, of the constitution of California, the act of legislature of March 12, 1885, is void, in so far as it attempts to authorize the acceptance of a corporation as sole and sufficient surety in an undertaking on appeal.

J. J. Coffey for respondent, Cramer; Robert Ash for appellant, Tittle.

*For subsequent opinion in bank, see 72 Cal. 12, 12 Pac. 869.

MYRICK, J.—Motion to dismiss an appeal on the ground of failure to file an undertaking as required by law. An undertaking was filed, with one surety only, viz., the Pacific Surety Company. The company was incorporated under the laws of this state, and executed the undertaking under the act of March 12, 1885: Stats. 1885, p. 114. That act authorized the officer approving a bond or undertaking to accept, as sole and sufficient surety, any corporation incorporated for the purpose of making bonds and undertakings. The general statute concerning appeals requires that the undertaking on appeal be executed by at least two sureties: Code Civ. Proc., sec. 941. The constitution (article 4, section 25) prohibits the legislature from passing a special law regulating the practice of courts of justice, and in all cases where a general law can be made applicable.

If the statute in question be taken as an attempted amendment to the Code of Civil Procedure, the objection arises that no such object is stated in the title. If it be taken as an independent statute, it is a special law for regulating the practice of courts, in so far as it attempts to authorize one surety only in place of two. So, also, it is special in a case in which a general law could be made applicable. A general law providing for two sureties has been in force and effect for years. This statute attempts to change the general law in special cases, viz., where a certain kind of corporation is offered as surety.

We are of opinion that the statute, in so far as it attempts to authorize the approval of a corporation as "sole and sufficient surety," is void. Motion granted without prejudice.

We concur: McKinstry, J.; Ross, J.

McAVOY v. BOTHWELL.

No. 11,744; September 27, 1886.

12 Pac. 161.

Appeal—Failure to File Transcript.—Appeal will be Dismissed, in pursuance of rules 3 and 4 of the California supreme court, for failure to file transcript, on clerk's certificate of that fact.

APPEAL from Superior Court, County of Alameda.

Judgment in the lower court having been rendered for plaintiff, defendant gave notice of appeal. On the expiration of the statutory time for filing the transcript, plaintiff moved to dismiss for failure to file the transcript within the proper time, under rules 3 and 4 of the supreme court, and presented the certificate of the lower court stating the fact that such transcript had not been filed as required by such rules.

W. Whitmore for appellant, Bothwell; B. McFadden for respondent, McAvoy.

By the COURT.—Application, on clerk's certificate, to dismiss an appeal for failure to file the transcript in time. The application is granted.

PEOPLE v. HIGGINS.

No. 20,214; September 30, 1886.

12 Pac. 301.

Criminal Law.—Where the Instructions Given by the Court are Contradictory, the judgment will be reversed.

APPEAL from Superior Court, Mendocino County.

Prosecution for assault with deadly weapon, with intent to do great bodily harm. Defendant was found guilty, fined one hundred dollars, and appealed to the supreme court.

Attorney General for the people; J. A. Cooper for appellant.

By the COURT.—In respect to the crime of which defendant was convicted, the instructions of the court below to the jury were conflicting, for which reason the judgment and order are reversed, and cause remanded for a new trial.

RIDGWAY v. BOGAN.

No. 9654; September 30, 1886.

12 Pac. 343.

Pleading—Amendment of Complaint After Demurrer.—If a demurrer to the complaint is sustained, the plaintiff is entitled to leave to amend, unless the complaint is so defective that it cannot be made good by any amendment.

APPEAL from Superior Court, Mariposa County.

Action to recover the proceeds of a note claimed to have belonged to plaintiff's decedent, and to have been wrongfully disposed of by defendant. Defendant demurred to the complaint, (1) because it did not state a cause of action; (2) because of defect or misjoinder of parties; and (3) because of ambiguity and uncertainty. The demurrer was sustained. Plaintiff moved for leave to amend, which motion was denied, whereupon plaintiff appealed, on the ground that he was entitled to leave to amend unless his complaint was so defective that it could not be made good by any amendment.

J. W. Congdon and G. G. Goucher for plaintiff and appellant; L. F. Jones for defendant and respondent.

By the COURT.—We are of opinion the court should have granted plaintiff's motion to set aside the judgment, and for leave to file an amended complaint. The order appealed from is reversed, and the cause remanded, with directions that the motion of plaintiff be granted.

HEINLEN v. BEANS and Others.

No. 8969; November 23, 1886.

12 Pac. 169.

Interest—Judgment.—Where, in an Action on an Undertaking on Appeal, given to secure rents and profits of certain real estate pending an appeal to the supreme court of California, under Code of Civil Procedure, section 945, if the judgment is affirmed, but not as rendered by the court below, the plaintiff is not entitled to recover anything of defendants, and therefore a ruling of the lower court adverse to his claim of interest, in this action on the judgment appealed from, is not erroneous.

APPEAL from Superior Court, Santa Clara County.

Action on an undertaking under section 945, Code of Civil Procedure, to recover interest on a judgment. Judgment for defendants. Plaintiff appealed. The facts are stated in the case with the same title (No. 9121): 71 Cal. 295, 12 Pac. 167.

G. A. Heinlen and J. C. Black for appellant; Houghton & Reynolds for respondents.

By the COURT.—This is an appeal by plaintiff from the judgment and certain orders in the case with the same title (No. 9121): 71 Cal. 295, 12 Pac. 167. The court below rendered judgment herein in favor of plaintiff for the sum of five thousand dollars. The plaintiff claimed that he was entitled to legal interest on this sum from the 5th of April, 1879, the day on which possession of the land involved in the suit of Heinlen v. Martin and Rogers was delivered to him. The court held against him on this contention, and this appeal was prosecuted, to have it determined whether he was so entitled or not.

Inasmuch as we have held in case 9121 that the plaintiff was not entitled to recover anything of defendants, he was not hurt by the ruling of the lower court adverse to his claim of interest, and there was no error in the court's so ruling. The same contention is presented on the orders appealed from, and the same conclusion follows.

As regards the above-mentioned appeals of plaintiff, the judgment and orders are without error, and are affirmed; but, on the return of this cause to the court below, that court will enter judgment as directed in case 9121.

FISK v. LEE.

No. 9790; November 29, 1886.

12 Pac. 255.

Interest—Computation—Interest on Compound Interest.—Where defendant, in California, executed her promissory notes payable in thirty days, with interest thereon at the rate of four per cent a month, interest to be paid monthly in advance, and, if not so paid, to become a part of the principal, and bear thereafter the same rate of interest, compounding monthly in advance, the court may properly, in calculating the interest due to plaintiff, allow interest on compound interest, or "interest on interest on interest."

APPEAL from Superior Court, Alameda County.

Action to enforce payment of notes and mortgage.

On or about the seventeenth day of June, 1881, the defendant borrowed from the plaintiff the sum of two hundred dollars in gold coin of the United States, and to secure the payment of the same, with interest, she executed and delivered to the plaintiff her four promissory notes, for fifty dollars each; each being in the words and figures following:

"$50. San Francisco, Cal., June 17, 1881.

"Thirty days after date, without grace, I promise to pay to Asa Fisk, or order, the sum of fifty and 00-100 dollars, to be paid only in gold coin of the United States of America, for value received, with interest thereon, in like gold coin, from date at the rate of four per cent. per month until paid; interest to be paid monthly in advance, and, if not so paid, to become a part of the principal, and bear thereafter the same rate of interest, compounding monthly in advance, for value received. This note to be paid at the banking-house or office of Asa Fisk, in the city of San Francisco.

"ABBA LEE."

The defendant at the same time, to secure the said notes, executed a mortgage on certain lots in the town of Haywards, Alameda county, California, in which it was stipulated, among other things, that defendant should pay thirty per cent on said principal and interest as attorney's fees in case of foreclosure, and would also pay taxes and assessments, which, if not paid, should be added to the principal, and bear interest at four per cent a month. The defense was that the notes and mortgage did not correctly set forth the terms of the agreement made between plaintiff and defendant respecting the loan, and the terms of the agreement were that plaintiff would loan defendant two hundred and fifty dollars for five or six years, and defendant should pay interest therefor at four per cent per annum; that defendant, being wholly inexperienced in business, had never previously executed any promissory note or mortgage, and had no one to advise her except plaintiff; that she was short-sighted, and unable to read without the aid of her eye-glasses, and, having left them at home, did not read over the notes and mortgage before signing them; that, in preparation of the notes and mortgage, she relied entirely on the plaintiff, and believed that they had been prepared in accordance with, and expressing therein the terms of, her previous agreement with plaintiff for the loan.

On the hearing judgment was given that plaintiff was entitled, on her said loan of two hundred dollars, to the total sum of seven hundred and forty-four dollars and thirty-one cents, and foreclosure sale was ordered, and, in case of the property proving insufficient, a judgment should be docketed for the balance against defendant, and execution issued thereon. The defendant appeals. Apparently there was an exception taken by defendant to the allowance of interest upon compound interest, which the appellate court overruled.

R. Percy Wright for appellant; E. H. Rixford for respondent.

By the COURT.—The court below did not err in its calculation of interest. The mode adopted is in strict accord with the contract of the parties. Judgment affirmed.

ALHAMBRA ADDITION WATER CO. v. RICHARDSON and Others.

No. 11,509; November 30, 1886.

12 Pac. 343.

Waters — Irrigating Ditch — Injunction—Estoppel.—Plaintiffs derive title to the water of a canyon from W., who, while owner, represented to one of the defendants, who he knew was thinking of purchasing certain land, that the right to use water from said canyon therefor was appurtenant thereto. Defendant therefore purchased the land. Subsequently plaintiff's grantors, in order to save waste, proposed to run a pipe across defendant's land. Defendant assented on condition that the pipe should be so laid that he should be enabled to use therefrom the quantity of water to which he had theretofore been entitled. This was done, and defendants used the same until the bringing of this action. Held, that the plaintiff was estopped from interfering with the rights acquired by the defendants to the use of the pipe, and its appurtenances, as long as the same remain as conduit of the water over their land.

APPEAL from Superior Court, Los Angeles County.

The court below adopted findings of the jury, and made findings of its own, to the following effect: That plaintiff is the owner of all the water rising and flowing in that canyon, in the county of Los Angeles, known as the "Kewen Mill" or "Lake Vineyard Canyon," as alleged in the complaint, and of the right to use and appropriate the same, except that portion thereof belonging to the defendants; and, further, is the owner of the dams, ditches, reservoirs, and pipes that convey said water, subject to the right of the defendants to use the same for the purpose of taking the waters belonging to them; that the principal aqueduct used by plaintiff for conveying the water is an iron pipe passing through defendants' land; that J. H. Carpenter, a prior occupant of the Richardson place, asserted a right to use water from Kewen canyon, and had a license from B. D. Wilson, under whom plaintiff claims; that Richardson used the water from 1867, uninterruptedly, under a claim of right, peaceably, adversely, exclusively, and continuously; that plaintiff and its grantor have known of defendants' claim, and have acquiesced therein;

that defendant Richardson, before purchasing his lands, inquired of B. D. Wilson whether the water right claimed by defendant was appurtenant to the land, for the purpose of determining whether he would buy the premises; that Wilson, knowing that such was Richardson's purpose, and being then the owner of all the rights claimed by plaintiff, stated that such water right was appurtenant to said land, and Richardson, because of that admission, purchased the land, and made valuable improvements thereon; that but for that statement he would not have made the purchase; that defendants, since 1870, used the water in question for the purpose of irrigation, and for domestic and stock purposes; that the quantity requisite therefor is two and one-third inches, under a pressure of four inches; and that defendants' claim has been asserted and maintained by defendants, and their predecessors, openly, notoriously, under a claim of right, and adversely to all the world, for twenty years.

On which findings of facts the court found this conclusion of law: That "the plaintiff is the owner of all the water rights set out and claimed in the complaint herein, and also of all pipes, ditches, aqueducts, and reservoirs appertaining thereto, as described in the complaint, except a constant flow of the waters of said canyon of two and one-third inches, measured under a four-inch pressure, on defendants' said premises, which said quantity of water belongs to defendants for uses upon the lands belonging to them, as hereinbefore found; and that defendants are entitled to the use of said pipes, ditches, aqueducts, and reservoirs for the purpose of storing, preserving, and conducting the same upon their said land, for the purposes aforesaid, and the right to take said water from said pipe, as now constructed, at any point upon their said land"; and directed a decree accordingly.

The appellants, on their appeal, relied on the following points:

(1) The findings did not cover all the issues, since defendants in their answer claim under an agreement made in 1875, when the pipe was put through defendants' land, that defendants might tap the pipe, and use the water; and also that plaintiff is barred by section 318, Code of Civil Procedure.

(2) The findings were not justified by the pleadings, since defendants' utmost claim was that plaintiff's grantors agreed

that defendants might tap the pipe, and use water therefrom, while the findings make plaintiff's ownership subordinate to defendants' right to use the dams, etc., for the purpose of taking water from Kewen canyon.

(3) The findings are contradictory, since at one place it is found that defendants' grantors used the water under a license from B. D. Wilson, and at another that defendants and their grantors, for more than twenty years (which carries us back to a time anterior to Carpenter's selling out to Richardson), have had the open, notorious use of the water, under a claim of right, and adversely to the whole world.

(4) The judgment is not warranted by the findings, nor the pleadings. It adjudges ownership of the waters and dams, etc., used in diverting the same, excepting that defendants own two and one-third inches of water, and are entitled to use the plaintiff's dams, etc., for the purpose of conducting, storing, and preserving the same, while the prayer of the answer asks for no such judgment; and the answer sets up the agreement that defendants might use the water, made at the time the pipe was laid, which was simply a license. The judgment is not warranted by the findings, because the court does not find that defendants owned the pipe, dam, etc.

(5) The findings are not supported by the evidence, which is discussed at great length.

(6) Errors of law at the trial, excepted to by plaintiff. Defendants Richardson and Hutchinson claimed that they had a right to the water, under Mr. Wilson's deed to Hutchinson, as appurtenant to the land conveyed. Plaintiff offered to prove declarations of Mr. Wilson concerning the water right of the place prior to the making of the deed. Defendants objected, and the objection was sustained.

Chapman & Hendrick, Glassell, Smith & Patton and T. B. Bishop for appellant; Wells, Van Dyke & Lee and Bicknell & White for respondents.

FOOTE, C.—This action was brought with a view of obtaining a judgment affirming to the plaintiff the whole of the right, title, and interest in and to certain waters mentioned in the complaint, as well as to the pipe which conducted said waters over the defendants' land, as also to the waterworks

and appurtenances thereto belonging. An injunction was prayed for, restraining the defendants from tapping the pipe and taking water therefrom, or in any other manner interfering with or diverting the same.

The defendants' demurrer to the complaint was overruled, and then they answered, stating substantially that they owned a certain tract of land over which the pipe was conducted, and were entitled to take a sufficient amount of water therefrom to irrigate said land, and that such privilege they have exercised for more than sixteen years, adversely, openly, notoriously, and uninterruptedly, under a claim of right. And with a view, evidently, to show an estoppel in pais as to the plaintiff's right to dispute the defendants' claim as aforesaid, the answer sets forth, in brief, this state of facts:

That before Richardson, one of the defendants, purchased the land upon which he claims the right to the use of said water, he asked Mr. Wilson, upon whose land the spring was situated from which the water took its rise and naturally flowed, whether that land, now called the "Richardson Place," was entitled to sufficient of that water for the purposes of its irrigation, and for the domestic uses of its occupants, and that Mr. Wilson, with a knowledge and understanding of the object of the inquiry and of the surroundings, stated that such land was entitled to such water, and that, relying upon this statement of Wilson, Richardson purchased from Hutchinson, his codefendant, an interest in the "place" in good faith, and put thereon various valuable improvements; that for many years after that time, and up to the year 1875, the water in question flowed to the said premises in and through an open ditch; that this resulted in a waste of water; hence, for the purpose of preventing such waste, the plaintiff's predecessors in interest, who were entitled to all the waters flowing from said source on Wilson's land, except that acquired by defendants as aforesaid, concluded to dispense with the exposed conduit, and to run the water through an iron pipe; to this desire, expressed to them on the part of the plaintiff, the defendants assented, upon condition that the pipe should be so laid as that the latter would be enabled to use therefrom a quantity of water sufficient to irrigate their lands, which was the portion thereof to which they had theretofore been entitled; that upon this agreement

the pipe was put down in 1875, and hydrants attached thereto for the defendants' use; and that such hydrants have ever since been used by them for the taking from the pipe the amount of water which they then, and for many years before had, claimed as their own.

The issues thus raised were submitted to a jury, and were passed upon by them favorably to the defendant. The trial court adopted such findings, and added others as to matters not fully covered by the interrogatories upon the subject submitted to the jury.

Upon all the findings, judgment was rendered for the defendants, upholding their claim to a certain portion of the water in dispute, and, as an incident thereto, the use, and an interest in it (so long as the pipe should remain as constructed; that is, so long as it should remain as a conduit of the water over and through their land, and to the waterworks, which were necessary to its being run through said pipe), sufficient to enable the defendants to take from the pipe, and make use of it, at any point on their land, the quantity of water which of right belonged to them. At least, such is the proper construction of the language of that judgment as it appears to us.

The evidence, conflicting as it is, does not warrant a disregard of those findings. From the record, it appears in evidence, on the part of the defendants, that, under an agreement between the parties to this action, the defendants consented to discontinue the wasteful use of the water through the ditch, and allow the same to be conducted over their land by the plaintiff in a pipe, upon condition that the former might tap the pipe, and take the water which they then were, and had for many years been, the owners of, at any point on their said land, that this agreement was executed by both parties thereto, and that such execution has been continuous and uninterrupted for many years.

The findings of the court, as we think, are sufficient at least to show that it passed upon the issue raised, and believed such facts to be true. Hence it would appear that, as a matter of law, the plaintiff should be estopped from any interference with the rights acquired by the defendants to the use of the pipe, and its appurtenances, as long as the former remains a conduit for the water over the defendants' land,

and that the defendants are entitled to tap said pipe, and use the water, which they are declared to be owners of, so long as said pipe remains, with its appurtenances, as "now constructed." It therefore becomes unnecessary to pass upon any of the other questions arising upon the record, as the issue thus properly made by the pleadings, and found in favor of the defendants, entitles them to the judgment, as we understand its meaning.

The judgment and order denying a new trial should be affirmed.

We concur: Belcher, C. C.; Searls, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

GREER v. TRIPP.

No. 9643; December 10, 1886.

12 Pac. 301.

Statute of Limitations—Ejectment.—Evidence Held to Sustain Defense of statute of limitations, and judgment affirmed.

APPEAL from Superior Court, San Mateo County.

Action of ejectment. Among other defenses, defendant set up the statute of limitations. It appeared that defendant claimed under deeds executed in 1858, had from that time claimed title, most of the time was in possession, and was in possession when this action was instituted, on May 10, 1876. The superior court held the action barred, and, plaintiff's motion for a new trial being denied, he appealed to the supreme court.

John Reynolds for appellant; Fox & Kellogg for respondent.

By the COURT.—There was sufficient evidence to support a finding in favor of defendant upon the plea of the statute of limitations to uphold the judgment.

Order denying plaintiff's motion for a new trial affirmed.

PARTRIDGE v. SHEPARD and Others.

No. 9403; December 15, 1886.

12 Pac. 351.

Ejectment—Defendant not in Possession—Ejectment will not lie against one not in possession of the land sought to be recovered.

APPEAL from Superior Court, City and County of San Francisco.

E. A. & G. E. Lawrence for appellant; Daniel Rogers for respondent.

By the COURT.—In this cause, which is ejectment, the court found that defendants were not in possession when the action was commenced. This finding is sustained by the evidence. Judgment passed for defendants. The finding above mentioned is conclusive of the cause and no other point need be determined.

Judgment and order affirmed.

KAHN v. BAUER, Treasurer.

No. 11,764; December 22, 1886.

12 Pac. 477.

Mandamus—Motion to Quash—Affidavit for.—On a motion to quash a writ of mandamus compelling a state officer to redeem certain bonds in accordance with a state law, an affidavit which states, in substance, that the validity of the bonds had been passed on in the United States courts is insufficient.

Motion to quash alternative writ of mandate.

An alternative writ of mandate had issued in this case, compelling defendant to advertise for the redemption of the Montgomery avenue bonds, as provided in the act of April

1, 1872 (Stats. 1871–72, p. 919). A motion was made to quash the writ, based on an affidavit which stated, in substance, that the validity of the bonds in question had been passed on in other actions by the circuit court of the United States, and also that a writ of error was pending in the supreme court of the United States.

D. M. Delmas for petitioner; John L. Love and P. G. Galpin for respondent.

By the COURT.—The facts stated in the affidavit on which the motion to quash the writ heretofore issued in this case is made are insufficient to authorize this court to grant the motion.

The motion must be denied, with leave to respondent to answer within ten days.

KAHN v. BOARD OF SUPERVISORS OF CITY AND COUNTY OF SAN FRANCISCO.

No. 11,765; December 22, 1886.

12 Pac. 478.

D. M. Delmas for petitioner; John L. Love and P. G. Galpin for respondent.

By the COURT.—On the authority of Kahn v. Bauer, ante, p. 728 (No. 11,764, this day decided), motion denied, with leave to respondent to answer within ten days.

Ex Parte BERNARD.

No. 20,259; December 30, 1886.

12 Pac. 487.

Arrest—Debtor Leaving State.—An Affidavit for an order of arrest under section 479, Code of Civil Procedure of California, need not, in order to show that the defendant's proposed departure from the state is with intent to defraud his creditors, allege that he is about to remove any of his assets or property.

On habeas corpus from Superior Court, City and County of San Francisco.

This was a petition for a writ of habeas corpus filed by B. S. Bernard. The petitioner had been placed under arrest by an order of the superior court of the city and county of San Francisco, issued on an affidavit made by one Borowsky, plaintiff in an action on a contract pending in that court against the petitioner. The affidavit alleged, in substance, that the petitioner was about to depart the state with intent to defraud his creditors, but did not state or show that he was about to remove any of his assets or property from the state.

William H. Sharp for petitioner; Crittenden Thornton and F. H. Merzbach for respondent.

By the COURT.—We are of opinion that the affidavit on which the judge of the superior court made the order of arrest stated facts and circumstances tending to show that the petitioner was about to depart from the state with intent to defraud his creditors. We therefore decline to discharge the petitioner from arrest.

The petitioner is remanded to custody and the writ is discharged.

BROWN and Others v. CENTRAL PAC. R. CO.*

No. 11,383; January 3, 1887.

12 Pac. 512.

Railroads—Contributory Negligence.—Where, on the Trial of an action for damages against a railroad company brought for the death of a train conductor in defendant's employ, it appears that such conductor was in absolute control of a long freight train; that there were three brakemen who were under him, and whose positions, respectively, were on the front, middle and rear of the train; that the middle brakeman, when the train was leaving the last station at which it stopped before the accident, was about to go to his position, when he was stopped by the conductor to assist him in checking waybills, and remained in the baggage-car after such checking was finished, and until the accident happened, there is evidence of negligence in the conductor; but the verdict for plaintiff may be sustained,

*For subsequent opinion in bank, see 72 Cal. 523, 14 Pac. 138.

where the instructions of the judge are clear, on the theory that the jury considered that the negligence of the conductor did not contribute proximately to produce the accident.

Trial—General or Special Verdict—Omission to Make Special Findings.—When, on the trial of an action for damages, the jury are instructed that they may return either a general or a special verdict, but, if a general verdict is returned, they must also make written findings on the particular findings of fact submitted to them in writing, and the jury return a general verdict for the plaintiff, without passing on the special facts submitted, which is received and entered by the court without objection by counsel, the defendant cannot object to the verdict, on appeal, as irregular, as the reception and entry of the verdict by the court amounted to a waiver of the request for the special findings.[1]

APPEAL from Superior Court, Los Angeles County.

Action for damages against railroad company. Judgment for plaintiffs. Defendant appeals.

Glassell, Smith & Patton for appellant; Howard, Brousseau & Howard for respondent.

SEARLS, C.—This is an action to recover damages by plaintiffs, the widow and children, as heirs, of Gilman George Brown, deceased, for the death of the latter, through the alleged negligence of defendant, a railroad corporation. Plaintiffs had a verdict and judgment for ten thousand dollars and costs, from which judgment, and from an order denying a new trial, defendant appeals.

The decedent of plaintiffs was a conductor on the railroad of defendant, and, as such, left Los Angeles on the evening of April 7, 1877, in charge of a mixed train, consisting of over twenty cars, drawn by a locomotive engine in charge of Frank Wilson as engineer. While proceeding on its way, about midnight of the same day, the train, when at or near the foot of a slightly descending grade, broke in two, or parted; the front part with the engine running a considerable distance before the accident was discovered. When discovered, the engineer, in obedience to the signal of the only brakeman left upon the front part of the train, reversed his engine and backed up, in doing which he collided with the still advancing

[1] **Cited** in Livingston v. Taylor, 132 Ga. 9, 63 S. E. 698, holding that by passive acquiescence in a formal verdict one waives the right to a special verdict.

rear portion of the train, partially wrecking the latter, and killing the conductor, Brown.

The gravamen of the charge against defendant, as contained in the complaint, is that, through its negligence, carelessness and default, it employed, as engineer upon its train, one Frank Wilson, an unsafe, unskillful, untrustworthy and incompetent person, of whose unskillfulness, untrustworthiness and incompeteney defendant had notice; and that by reason of the negligence, carelessness and lack of skill of said engineer, the accident occurred, whereby Brown was killed. The answer denies all negligence on the part of defendant, and avers that the accident and its consequences were due to the negligence of Brown, the deceased conductor, in not having his brakeman at their posts, etc.

Plaintiffs' intestate, as conductor of the train, and Frank Wilson, the engineer, by whose negligence it is claimed Brown was killed, were coemployees in the same general business. It follows that defendant could only be liable for the negligent act of the engineer whereby deceased lost his life, upon the theory that it neglected to use ordinary care in the employment or retention of such engineer: Hogan v. Central Pac. R. Co., 49 Cal. 130.

"An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business, in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee": Civ. Code, sec. 1970; Sweeney v. Central Pac. R. Co., 57 Cal. 15.

Under the pleadings and evidence in the cause, three propositions were essential to recovery by the plaintiffs: (1) Negligence or the want of ordinary care by defendant in the employment or retention of Frank Wilson as an engineer; (2) negligence of such engineer, whereby Brown was killed; and (3) the absence of concurring negligence on the part of Brown proximately contributing to the injury. There was evidence pro and con upon each of these propositions.

Upon the first, there was testimony tending to show that Wilson, the engineer, had been for some time addicted to the intemperate use of intoxicating drinks, to such a degree and

in so public a manner that defendant's officers whose duty it was to employ, superintend and discharge engineers would be likely to know, and should have known, of his habit, and that he had been previously discharged once or twice by defendant on another division on account of intoxication. This was denied by defendant.

As bearing upon the first and second propositions, there was uncontradicted testimony that on the day of the accident Wilson had with him upon his engine a bottle of whisky, from which he and others drank freely; that, when the train had parted, he ran back over the road without sending a flagman ahead, or sounding his whistle or bell, which was in violation of the rules of the company. There was also testimony to the effect that Wilson was either asleep, or stupid from drink, when the train parted, and had to be aroused by his fireman, and that in backing up he did so at a dangerous rate of speed. These last facts are contradicted.

Without proceeding to state the testimony, which is quite voluminous, it is sufficient to say there was evidence sufficient to uphold the verdict of the jury, and the cause should not be reversed for want of evidence or because the verdict was contrary to the evidence.

The only branch of the case which has awakened serious doubts as to the correctness of the verdict is that relating to the contributory negligence of the deceased. He was conductor of the train, and was making his first trip over the road. The night was clear, and the moon shone, but upon the desert track over which the train was passing the dust obstructed the view to a great extent. The road was composed of not heavy, but of varying and changing, grades. The train was a long and heavy one, and was supplied with three brakemen, one of whom acted also as baggage-master. The conductor was master of the train, and, under ordinary circumstances and for all practical purposes, had absolute control over all persons employed thereon.

The position of the brakemen should have been, one in front, one at or near the middle of the train, and the other upon the rear car. The middle brakeman, upon leaving Indio, the last station at which the train stopped before the accident, was about to go to his place, when he was detained by the conductor to assist the latter in calling off and checking

way-bills. That office performed, he remained in the baggage-car with the conductor, and was lying down upon some mail-sacks when the accident occurred.

Neither the conductor nor brakeman was aware the train had parted. They felt a shock as if from passing over a rough joint, and, although the evidence is not clear upon the point, we suppose the detached portion, consisting of say six cars, slowed down. We infer this from the fact that the conductor asked the brakeman if they were approaching Walters, or "Is this Walters?"—a very natural inquiry for a stranger upon the road on finding the speed of his train checked. He was informed they had not run far enough for Walters. Mr. Brown then rose, looked out the side of the baggage-car, and so far as appears saw nothing to indicate trouble. The crash came very soon thereafter.

It would seem to us that the conductor was negligent in not having his crew at their posts, and we can only uphold the verdict upon the theory that the jury, from all the facts presented, and under the very clear instructions of the court upon the point, must have come to the conclusion that the negligence of the conductor did not contribute proximately to produce the fatal result. We are not quite satisfied upon the point, but, as before stated, do not feel warranted in setting the verdict aside for this cause.

The giving of the following instruction is assigned as error: "Second. If you find from the evidence that the plaintiffs are the widow and children, respectively, of Gilman George Brown; that said Brown met his death in consequence of the negligence of the defendant, through its employee Frank Wilson, without such negligence on his part as to directly contribute to the accident—then your verdict should be for the plaintiffs, and you should assess their damages at such sum as under all the circumstances of the case may be just; and, in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by these plaintiffs in the death of the deceased by being deprived of their support by him; also the relations proved as existing between the plaintiffs and deceased at the time of his death, and the injury, if any, sustained by plaintiffs in the loss of his society."

The instruction simply informs the jury as to their duty in the premises if they shall find that Brown, without contributory negligence on his part, "met his death in consequence of the negligence of the defendant, through its employee Frank Wilson." It does not state, or purport to state, the facts or circumstances which, under the pleadings and proofs, would constitute negligence on the part of defendant. It speaks of negligence in the abstract, for the apparent purpose of reaching the conclusions flowing therefrom and consequent thereto.

In a criminal case against a defendant charged with murder, there can be no impropriety in charging the jury that, if they find the defendant guilty of murder in the first degree, they may fix the penalty at, etc., although such charge failed to define what constitutes murder. So, in the present case, the instruction under consideration defined the result from a given standpoint. The data from which this standpoint was to be determined—its existence or nonexistence ascertained—was to be found in the other instructions given, between which and the one indicated there was and is no conflict.

We should be glad to insert at large the instructions given, containing, as we think they do, a clear exposition of the law applicable to the case; but their length precludes us from so doing.

After instructing the jury, the court, at the request of counsel for defendant, submitted to them certain questions of fact in writing, and in reference thereto instructed them as follows: "In this case you, in your discretion, may render a general or a special verdict; but the court instructs you that, if you render a general verdict, you will also find upon the particular questions of fact stated in writing, and herewith submitted to you, and make your written findings thereto." The jury returned a general verdict in favor of plaintiffs, but did not pass upon the special facts submitted.

One of the members of the firm of attorneys who acted in the cause for the defendant was present at the rendition of the verdict, polled the jury, and made no objection to the want of findings upon the special facts, and no notice seems to have been taken of the omission. The attorney so present had not participated in the trial, but consented, on behalf of his law firm, to receive the verdict.

The action being for the recovery of money only, it was discretionary with the jury to find a general or special verdict, subject to the provision that, if they found a general verdict, the court in its discretion might require them to find upon particular questions of fact in addition thereto: Code Civ. Proc., sec. 625. This, as shown above, the court required, but the jury failed to respond. The verdict as rendered was complete, and such as the court was authorized to receive, and the reception and entry of verdict by the court and counsel without objection amounted to a waiver of the request for findings upon the particular questions of fact.

Upon the whole case as presented we are of opinion the judgment and order appealed from should be affirmed.

We concur: Belcher, C. C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

PEOPLE v. FRINK.

No. 20,251; January 15, 1887.

12 Pac. 616.

Criminal Law — Appeal — Delay in Perfecting—Dismissal.—Under Penal Code of California, section 1246, requiring the clerk with whom the notice of appeal is filed, within ten days thereafter, or within ten days after the settlement of the bill of exceptions, to transmit to the clerk of the appellate court a copy of the record, an appeal will be dismissed on a showing by certificate of the clerk below that four years have elapsed since the taking of the appeal; that defendant has never requested the clerk to make up a transcript; that the bill of exceptions has never been filed, though settled; and that no transcript has been sent to the supreme court.

APPEAL from Supreme Court, Stanislaus County.

Defendant was adjudged guilty of libel, sentenced, and took an appeal from the judgment and order denying a new trial. Respondent moved, on certificate of the clerk of court below,

for a dismissal, showing that more than four years had elapsed since appeal taken; that defendant had never requested the clerk to send up a transcript of the judgment and proceedings; that the bill of exceptions had never been filed by defendant, though settled, and no transcript had been sent to the supreme court by the clerk of the superior court.

Section 1246, Penal Code of California, requires the clerk with whom the notice of appeal is filed, within ten days thereafter, or within ten days after the settlement of the bill of exceptions, to transmit to the clerk of the appellate court a copy of the notice of appeal, record, bills of exception, and instructions given and refused; and section 1249, Penal Code of California, empowers the appellate court to dismiss the appeal, if section 1246 is not complied with.

P. J. Hazen and Wright & Hazen for appellant; T. A. Coldwell, district attorney, for the people.

By the COURT.—Motion to dismiss appeal granted.

GREEN and Another v. STATE.*

No. 11,169; January 20, 1887.

12 Pac. 683.

Waters—Canal—Sacramento and American Rivers—Act of 1885—Liability of State.—The California act of March 12, 1885 (Cal. Stats. 1885, p. 107), authorizing suits to be brought against the state for damages caused by the destruction of property from the cutting of a canal by order of the levee commissioners, for the purpose of diverting the waters of the American river into the Sacramento river, by virtue of the California act of April 9, 1862, had merely the effect of submitting the state to the jurisdiction of the courts, and did not create any new ground of liability against the state.

Waters — Changing Stream — Eminent Domain.—Under the language of the California constitution, as it existed prior to the adoption of the new constitution of 1879, if, in pursuance of an act of the legislature, the channel of a river be turned or straightened where it empties into another river, so that the land on the opposite

*For subsequent opinion in bank, see 73 Cal. 29, 14 Pac. 610.

side of the river is destroyed or injured, the damage thus sustained is not a taking of the land for public use; following Green v. Swift, 47 Cal. 536.

APPEAL from Superior Court, Sacramento County.

A. L. Hart and C. T. Jones for appellants; E. C. Marshall, attorney general, and John T. Carey for the state.

SEARLS, C.—This cause was decided by Department 1 of this court, in an opinion filed July 14, 1886, affirming the judgment of the court below. A rehearing in bank was thereafter ordered, and the case again comes under review.

1. The act of March 12, 1885, authorizing the commencement of this action by plaintiffs against the state, simply empowered them to bring a suit, and to make the defendant a proper party thereto. It did not create for them a cause of action, or waive, on the part of the defendant, any defense which it had to such action. The state submitted itself to the jurisdiction of the court, subject to its right to interpose any defense which, as a sovereign state, it might lawfully urge to the action when instituted. The contention that the act of March 12, 1885 (Stats. 1885, p. 107), amounts to a legislative concession of the liability of the state, is not supported by sound reason. Were the state to pass a general law permitting all persons at will to institute suits against it, surely it would not be contended that such an act conceded the existence of a cause of action in favor of all persons bringing suits.

Ordinarily, and in theory, a sovereign state is presumed to be ready and willing to do justice to the citizen, without the necessity of invoking the assistance of the judicial arm; but, in exceptional and intricate cases, the legislative department finds itself inadequate to balancing and adjusting claims, depending upon the solution of abstruse questions of law. In such cases it is eminently proper that the question of legal obligation and the measure of damages be submitted for adjustment to that department of the government whose peculiar province it is to investigate and determine questions of like character. How such submission to the courts can be construed into a recognition of the existence of a cause of action we cannot comprehend.

It may be the legislature could, in a proper case, determine the liability of the state, and then refer the question of the amount of compensation to the courts, if it saw fit so to do. But in the present case it has not pursued that course. The language of the statute does not bear any such construction. We quote: "If it appears, upon the trial of any said actions, that damage has been done to the plaintiff by any act for which the state is legally liable," etc. To hold that this expression of legislative intent is to be construed as admitting a right to recover is to beg the question, and do violence to the statute. By authorizing the plaintiffs to bring suits against the state, the legislature simply remanded them to the courts for a determination of their rights, and no argument in favor of the liability of the state can be drawn therefrom which may not with equal force be urged in favor of any plaintiff against the defendant whom he is authorized to sue at law.

2. The whole question of the right of plaintiffs to recover was necessarily involved in the determination of Green v. Swift, 47 Cal. 536.

Agreeing, as we do fully, with the views expressed by Justice McKinstry in the former decision of this cause, we are of opinion the judgment heretofore rendered, affirming the judgment of the court below, should stand as the judgment of the court herein.

We concur: Belcher, C. C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment is affirmed.

THORNTON, J.—I dissent from the judgment in the above-entitled action.

In re Disbarment of TYLER.

No. 11,442; February 6, 1887.

13 Pac. 169.

Attorneys—Disbarment—Motion for New Trial.—Where the supreme court has, by its judgment, disbarred an attorney, a motion for a new trial will not be heard by it.

This was a motion for a new trial of the case of In re Tyler, 12 Pac. 289, which was heard before the supreme court of California, December 3, 1886, when said attorney was disbarred by the judgment of the supreme court.

Pillsbury & Blanding for complainant; James Crittenden for respondent, Tyler.

By the COURT.—The motion for a new trial is not the proper remedy in this cause. Considered as a petition for a rehearing, we see no reason to grant it.

Motion for a new trial and a rehearing denied.

KIRBY v. HARRINGTON.

No. 12,011; February 15, 1887.

13 Pac. 218.

Appeal—Damages on Dismissal.—On the dismissal of an appeal, damages will not be awarded in the respondent's favor on his ex parte affidavit that he has been informed and believes the appeal to be without merit.

APPEAL from Superior Court, San Francisco.

Mortgage foreclosure.

A motion to dismiss the appeal was made upon a certificate, in the form required by rule 4 of the court. It was not contended that the certificate was insufficient. The only opposi-

tion of appellant was to the imposition of damages. Respondent's (plaintiff's) affidavit was to the effect that the action was brought to foreclose a mortgage; that defendant admitted a balance due, for which judgment was entered; that plaintiff was about to enforce the judgment by proper process, when defendant took an appeal, December 20, 1886, and more than forty days elapsed since appeal was perfected; that plaintiff was put to the expense of extra counsel fees; "and affiant is informed, and on such information avers, that said appeal is wholly without merit, and taken solely for the purpose of delay." Prayer for damages.

Matthew I. Sullivan for appellant; John J. Coffey for respondent.

By the COURT.—The certificate of the clerk of the superior court is in due form, and the appeal should be dismissed. But the application of respondent for damages on appeal must be denied. We are not authorized to decide an appeal to be frivolous on the ex parte affidavit of respondent that he has been informed and believes it to be without merit: Vaughn v. Werley, 62 Cal. 181.

Appeal dismissed.

BURGESS v. SUPERIOR COURT.

No. 11,887; February 23, 1887.

13 Pac. 166.

Appeal—Justice of Peace—Copy of Docket.—On an appeal from a justice's court to a superior court, where all the papers in the case have been transferred except a copy of the justice's docket, the superior court has jurisdiction to order the transfer of a copy of the justice's docket under Code of Civil Procedure of California, section 975.

Prohibition to restrain superior court from trying a case on appeal from justice's court.

J. W. Turner for petitioner; J. W. Bartlett for respondent.

By the COURT.—It appears by the answer of respondent that an appeal has been duly perfected to said superior court

from a judgment of a justice of the peace, who transferred all the papers in the case except a copy of his docket, which the superior court has made an order to have transferred as the law requires: Code Civ. Proc., sec. 975. Petitioner demurs to said answer, and upon the issue so raised the matter is submitted. The answer, in our opinion, shows that respondent is not acting without, nor in excess of, its jurisdiction.

The demurrer is overruled.

CASWELL v. HARRIS.

No. 8591; February 23, 1887.

13 Pac. 166.

Pledge by Bank Officers—Fraud on Creditors.—Where, on the the question of an alleged fraudulent pledge made by the president and secretary of a corporation for the benefit of certain creditors, the court below directs the jury that said president and secretary had power to make the pledge, and the jury find the same to be fraudulent, a judgment affirming such verdict will not be disturbed, the question of fraud being for the jury, and their verdict not necessarily contrary to the direction of the court.

This is an action in replevin, brought by B. F. Caswell, appellant, as a pledge-holder of certain personal property, against defendant, who took the said property as sheriff under two writs of attachment. The property belonged to a corporation named the Bear Creek Lumber Company, which turned it over, by way of pledge, to plaintiff, for the benefit of all its creditors except mortgage creditors. This pledge was to replace a prior agreement, assented to by all the creditors, placing the business in the hands of a trustee, who had not accepted. This agreement restrained the creditors from suing. The agreement to accept the pledge was signed by certain of the creditors only. Immediately after this pledge, the mortgage creditors brought suit by attachment, claiming that their security was worthless. They attached this property in that suit. They obtained judgment, and defendant, as sheriff, sold the property. Some of the other creditors also

placed a second attachment on the property, and obtained judgment, notwithstanding the agreement, claiming it was void by reason of some of the signers to it being paid in full, in pursuance of a secret understanding to that effect when the agreement was signed. This was proved on the trial of the case of Kauffmann v. Bear Creek Lumber Co. Both Harmon and Kauffmann claimed the pledge was void, because made to defraud the creditors of the company. Judgment was rendered for defendant. Plaintiff moved for a new trial, on the ground that there was no evidence to support the verdict, and also on the ground of erroneous rulings of the court. The motion being denied, this appeal was taken.

S. F. Leib, C. D. Wright and Moore & Laine for appellant; L. Archer, D. M. Delmas and J. A. Yoell for respondent.

THORNTON, J.—Conceding that the court below erred in its direction to the jury, in which it affirmed the power of the president and secretary of the Bear Creek Lumber Company, a corporation, to make a pledge of its property in satisfaction of a just claim of the company, still the jury might have based their verdict on the conclusion that such assignment was void as made with intent to hinder, delay, and defraud creditors. On this issue certain circumstances were before the jury for their consideration. The jury were the proper triers of the intent, for the fraudulent intent of such an assignment is always a question of fact, and not of law, and is so expressly declared by statute in this state: Civ. Code, sec. 3442; see sec. 3449. In this view, the jury might, and no doubt did, find a verdict which was not at all in conflict with any instruction given them. The learned judge of the court below does not appear to have thought that the jury disobeyed any instruction which was given them. The motion for a new trial was denied by him, and we think properly denied. We find no error in the record.

The judgment is affirmed.

We concur: McFarland, J.; Sharpstein, J.

FITZGERALD v. LIVERMORE and Others.

No. 11,322; February 25, 1887.

13 Pac. 167.

Witness—Husband and Wife.— In an Action for the Recovery of Personal Property, the admission of the testimony of plaintiff's wife against him, without his consent, is ground for reversal, under the Code of Civil Procedure, section 1881.

APPEAL from Superior Court, Alameda County.

F. B. Ogden for appellant; Sam. B. Wiggin for respondent.

By the COURT.—This is an action for the recovery of personal property. The wife of the plaintiff was called as a witness for the defendant, and gave testimony against the plaintiff without his consent. Her testimony was material—in fact, covered nearly all the matters included in the findings of the court. The ruling admitting the testimony over plaintiff's objection was duly excepted to. We think the evidence in regard to the proceedings in insolvency was incompetent, and the objection on that ground should have been sustained. It is plain that the findings would not support a judgment for plaintiff.

Judgment and order reversed and a new trial ordered.

CUMMINGS v. CUMMINGS and Others.

No. 11,881; March 16, 1887.

13 Pac. 322.

Appeal—Undertaking—Stay of Execution.—Upon taking the appeal, the filing of the undertaking, for three hundred dollars, required by section 941, Code of Civil Procedure of California, had the effect of staying execution of the judgment as to appellant. Motion to stay execution granted.

Motion to stay execution pending appeal.

The "undertaking" referred to was one for three hundred dollars, under section 941, Code of Civil Procedure.

A. S. Kittredge for appellants; Thos. H. Laine and Goldsby & Jeter for respondent.

By the COURT.—In this cause the appellant Ketchum, on taking an appeal, filed the undertaking on appeal required by law. This had the effect of staying the execution of the judgment as to him, in all respects, pending the appeal.

The following order is directed to be entered: On motion of appellant Ketchum, it is hereby ordered that the execution of the judgment herein, as to him, be, and is hereby, in all respects stayed pending the appeal.

DAGGETT v. VANDERSLICE.

No. 9541; March 18, 1887.

13 Pac. 402.

Bailment — Action Against Bailee — New Trial.—Where an action was brought to recover the value of certain goods left with a defendant for safekeeping, and the court rendered a judgment in favor of defendant, and afterward granted the plaintiff a new trial, held, upon the facts of the case, that there was no such abuse of the discretion vested in the trial court as would warrant a reversal of the order.

APPEAL from Superior Court, City and County of San Francisco.

This action was brought to recover the value of certain silverware deposited by the plaintiff with defendant in the year 1872, at his store in San Francisco, for her own personal accommodation, and without any reward to be paid therefor. In 1883 she made a demand for the same, when defendant discovered that all of the ware except one piece

had been surreptitiously abstracted and taken from his possession, by some unknown person, without his knowledge or consent, and against his will. The goods had been purchased of defendant, who was a dealer in silverware and jewelry, and presented to the plaintiff, who requested that they might be placed in showcases in the store, and in which defendant did place them, and keep them for more than four years. Afterward they were removed from the showcases, and placed in the storeroom of the defendant, at his own instance, for the purpose of making room in the case for his own goods, and without the consent or knowledge of the plaintiff. The chief question was whether the defendant exercised the care required of him under the circumstances for the preservation of the goods. The court decided in favor of the defendant, and afterward, on motion of plaintiff, granted a new trial. And from this order defendant appealed.

S. F. Gordon & Young for Vanderslice, appellant; Byrne & Cross, for Daggett, respondent.

FOOTE, C.—This is an appeal from an order granting a new trial. The action was instituted to recover from Vanderslice, the defendant, the value of some silverware left with him for safekeeping. Judgment was rendered for the defendant. The plaintiff then moved for a new trial, which was granted, and from the order made therein this appeal is prosecuted. We perceive no such abuse of the discretion vested in the trial court as would warrant a reversal of the order made in the premises, and in our opinion it should be affirmed.

We concur: Belcher, C. C.; Searls, C.

By the COURT.—For the reasons given in the foregoing opinion the order is affirmed.

SIMON v. SUPERIOR COURT.

No. 11,986; March 20, 1887.

13 Pac. 474.

Writ of Review—Appeal from Justice's Court—Statement of Facts.—Upon an application for a writ of review of a judgment of the superior court of California, dismissing an appeal taken on both law and fact from a justice's court, where no statement of the case on appeal had been made and filed as provided by section 975, Code of Civil Procedure of California, the application was denied on the ground that the petition did not set forth sufficient facts.

The petition set forth, in substance, that one B. commenced an action for one hundred and twenty-three dollars against petitioner, in a justice's court; that on June 12, 1885, defendant in the said action (petitioner here) served on plaintiff's attorneys, and filed in said justice's court, his answer, denying all the allegations of the complaint. On said last day named judgment was entered against Simon, "but without determining the issues raised by said answer, and as if the same had not been filed." July 3, 1885, Simon appealed to superior court on questions of both law and fact, and filed undertakings for costs and stay of execution. B. subsequently moved the superior court (respondent here) to dismiss the appeal upon the grounds "that the appeal is on both law and fact, and no question of fact was taken in the court below, the defendant having failed either to demur or answer to the summons and complaint duly served on him, and his default was duly entered in said cause, and judgment as prayed for entered against him; and on the further ground that no statement of the case was made and filed in said cause as provided by section 975, Code of Civil Procedure." September 23, 1885, the motion to dismiss was denied, but subsequently, on January 14, 1887, the order of denial was vacated, and the motion to dismiss granted; the court refusing to entertain the appeal because no statement on appeal had been filed or settled, and the court considering the appeal from questions of law only. Wherefore petitioner prays a writ of review, etc.

J. M. Lesser and H. I. Kowalsky for petitioner; H. C. Firebaugh for respondent.

By the COURT.—Application for a writ of review denied. The petition does not set forth sufficient facts.

YOUNG v. POOLE.

No. 9,472; March 25, 1887.

13 Pac. 492.

Sale—Delivery as Against Creditors of Seller.—Where negotiations for a sale by an employer to his employee of certain property, including safes, were made in March, but the sale was not consummated until April 1st, upon which day the vendor was sued by a creditor, and, after the sale, the property remained in the same building as before, but the vendee's name appeared on the sign as successor to the vendor, held, that the sale was not followed by immediate delivery, and an actual and continued change of possession, as required by Civil Code of California, section 3440, and execution obtained by the vendor's creditor could be levied on the safes.

APPEAL from Superior Court, City and County of San Francisco.

On September 14, 1881, the defendant, Poole, was United States marshal for the district of California. Upon that day, under an execution duly issued out of the circuit court of the United States for the district of California, on a judgment therein in favor of the Wallamet Falls Canal & Lock Company, and against one Jonathan Kittredge, he levied upon, and thereafter sold, as the property of said Kittredge, four iron safes. Richard Young, the plaintiff, brought this action in the nature of trover in the superior court of the city and county of San Francisco, to recover the value of said safes, alleging that they were his property and in his possession at the time of the levy. Upon the trial below, before Evans, J., a jury being waived, the evidence showed that the bill of sale of the property in question from Kittredge to Young, under which Young claims title, was executed April 1, 1881, the day upon which the summons in the said action by the Wallamet Falls etc. Company was served upon said Kittredge. After the sale to Young, the property remained in the same building as before, Kittredge and Young reversing their former positions of master and servant, and Young placing his name, "as successor," over the sign of Kittredge, in front of the building. The material facts in regard to the

sale appear in the opinion. Judgment for plaintiff. Defendant appeals.

E. W. McGraw for appellant; Lattimer & Morrow for respondent.

By the COURT.—This action is to recover personal property levied upon as the property of Jonathan Kittredge. The plaintiff claims as purchaser from Kittredge. The negotiations for the sale were made in March, but the sale was not consummated until April 1st—the day on which summons was served on Kittredge. The levy of the execution was in September following. We think the undisputed facts show that the sale was not followed by immediate delivery, and an actual and continued change of possession, such as is required by section 3440, Civil Code.

Judgment and order reversed and a new trial ordered.

PACIFIC BRIDGE CO. v. JACOBUS and Others.

No. 9,851; March 26, 1887.

13 Pac. 493.

Action—Dismissal for Want of Prosecution—Service—Discretion.—Where the summons was not issued till nearly a year after the action was begun, and had not been served at the time of a motion to dismiss three years and eight months after its issuance, plaintiff explaining that he forebore to serve the summons for the reason that certain persons represented that defendant would abide the event of a test case, but not showing their authority to make the representations, and defendant denying it, held, that there was no abuse of discretion in granting the motion to dismiss.

APPEAL from Superior Court, Alameda County.

The record shows that this was an action to recover a street assessment; that it accrued November 6, 1877; that the action was commenced October 25, 1879; that the summons was issued October 6, 1880; that the summons has not been served; and that the plaintiff did nothing between the date of issu-

ance of the summons till the motion to dismiss was made. The motion to dismiss the action for want of prosecution was made May 29, 1884, based upon an affidavit of defendant that he had been at all times within reach of process; that the plaintiff had been wanting in due diligence, and did not begin the action in good faith. The plaintiff in his affidavits showed that certain persons, representing themselves to be an executive committee of certain property holders, who intended to resist the assessments, represented that it was the desire of all that an action of plaintiff against Kirkham, one of said committee, should be a test case, by the result of which they would all abide, and that, by reason of such representations, plaintiff forbore to serve the summons and prosecute said actions. Defendant, by his counter-affidavits, showed that the agreement among the property holders was simply to combine together to resist the collection of the tax, and pay the expenses of the litigation, both in the Kirkham case, and in any other cases that might arise, pro rata. The action was dismissed.

Vrooman & Davis, J. C. Martin and D. M. Delmas for appellant; B. McFadden and H. C. McPike for respondents.

By the COURT.—A careful examination of the transcript of the record—including the affidavits used on the motion—satisfies us that the court below did not abuse its discretion in granting the defendant's motion to dismiss the action, but that it was justified by the evidence in making the order appealed from. Order and judgment affirmed.

In re Estate of SANDERSON.*

No. 9653; March 29, 1887.

13 Pac. 497.

Executors—Accounts—Practice.—A Probate Court has the Power, in the settlement of an executor's account, to allow or disallow any items in the account, even though there is no contest; and, where it is brought to the knowledge of the court that the executor has failed to charge himself with money or property belonging to the

*For subsequent opinion in bank, see 74 Cal. 199, 15 Pac. 753.

estate, it is the duty of the court to examine the matter of its own motion.

Executors—Sale of Currency.—An Executor has No Authority, without an order of the probate court, to sell currency belonging to the estate for coin, and it rests in the discretion of the court to approve or disapprove the sale.

Executors—Delay in Collecting Debt.—If an executor delays to take steps for the collection of a debt until after the same is outlawed, and the delay is not in consequence of any mistake of law, or of advice given by his attorney, he will be liable to the estate for the loss occasioned by his negligence.[1]

Executors—Joint Executors—Several Liability.—Each executor of an estate is responsible severally for his own acts, and for money or property which has come to his own hands.

APPEAL from Superior Court, San Francisco.

This is an appeal by L. A. Sanderson, one of the executors of Robert A. Sanderson, from an order made upon the settlement of his accounts, requiring him to charge himself with five hundred dollars currency at its face value, which he had sold for gold coin, the court refusing to approve the sale, and to charge himself with the amount of a note and mortgage of one Braly, which he failed to collect. The note became outlawed, not having been sued on, and thereafter, the maker having died, his executor refused to pay anything. The executor sought to discharge himself for his neglect because his attorney did not advise him to foreclose the mortgage, but the evidence shows that his attorney, who had been employed for other and for specific purposes, advised him to present the claim against Braly's estate, which the executor undertook to do, and failed to attend to.

T. Z. Blakeman for appellant; Cope & Boyd for respondents.

TEMPLE, J.—This is an appeal by the executor from an order settling an account rendered by him to the probate

[1] Cited in State v. Germania Bank, 106 Minn. 171, 130 Am. St. Rep. 599, 118 N. W. 686, as authority for the American, as opposed, perhaps, to the English, rule that if a receiver relies on legal advice presumed to be competent, and nevertheless a claim becomes outlawed, that might have been sued upon seasonably in the interest of the estate, he is not to be held responsible.

court. We do not think it necessary to consider the question as to whether the issues made at the contest were sufficient. The court had the power to examine, to allow or disallow, any items in the account, even though there were no contest; and, if it were brought to the knowledge of the court that the executor had failed to charge himself with money or property belonging to the estate, it would be the duty of the judge to examine the matter of his own motion. Such being the case, it must follow that the decree could not be held invalid for the lack of a proper contest or finding. If the contestant were appealing, his right to have the action of the court reviewed might depend upon a proper contest being inaugurated. That matter is not now before us, however.

The first point is in regard to the sale of currency for gold coin. It was sold without obtaining an order of court, and the sale was not approved. This was within the discretion of the court. The executor was properly charged with the Braly note. Had the executor followed the advice of a competent attorney as to a matter of law, the case would be different. Here it is a plain question of negligence. It was the duty of the executor to execute his trust himself, and he cannot rid himself of responsibility by employing an attorney to do that which he ought to have done himself. The delay was not in consequence of any mistake of law, or of advice given by the attorney. It is a simple failure on the part of the executor to do his duty. Nor is the liability joint with his coexecutor. The note was in his individual possession, and the neglect was his. Each executor is responsible severally for his own acts, and for moneys or property which come to his hands. He may also, it is true, under some circumstances, be held for the default of his coexecutor. But that is because each is required to protect the estate, and prevent, if possible, injury from the misconduct of the other. But this is not a joint liability. When injury has resulted from the joint act of both, of course a different rule will prevail.

The order must be affirmed.

We concur: McKinstry, J.; Paterson, J.

KERR v. KERR.

No. 9521; April 26, 1887.

13 Pac. 654.

New Trial—Sufficiency of Evidence—Discretion.—A motion for a new trial, made on the ground of the insufficiency of the evidence to sustain the decision and judgment, is addressed to the sound discretion of the court, and an order on such a motion granting a new trial will not be reversed unless there has been a manifest abuse of that discretion.

APPEAL from Superior Court, San Francisco.

Davis Louderback and R. Thompson for appellant; Scrivner & Boone for respondent.

BELCHER, C. C.—This is an appeal by the defendant from an order granting the plaintiff a new trial. The motion was made and granted upon the ground that the evidence did not justify the decision and judgment. It is settled law in this state that a motion for new trial, made upon the ground of the insufficiency of the evidence to justify the verdict, or other decision, is addressed to the sound legal discretion of the court, and an order granting a new trial on such ground will not be reversed unless it appear that there has been a manifest abuse of that discretion: Phelps v. Union C. M. Co., 39 Cal. 407; Pierce v. Schaden, 55 Cal. 406; Bronner v. Wetzlar, 55 Cal. 419. In this case we see no such abuse of discretion as would warrant a reversal of the order, and it should therefore be affirmed.

We concur: Searls, C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the order is affirmed.

HALL v. COUNTY OF LOS ANGELES.*

No. 11,833; May 18, 1887.

13 Pac. 854.

Contracts.—An Action was Brought by an Architect Against a County to Recover for the value of services rendered in making certain plans for a jail building, which plans had been accepted conditionally by the county board of supervisors, provided that a bid should be accepted from some reliable party for the building of the jail. The board of supervisors refused to open any of the bids received, and rejected plaintiff's plans, on the ground that he had been guilty of improper acts in getting his plans provisionally accepted. Held, that it was within the discretion of the board to refuse to open or accept any of the bids based upon plaintiff's plans, and that the condition upon which plaintiff was entitled to compensation never having happened, he could not recover.

APPEAL from Superior Court, Los Angeles County.

Action for the value of certain services alleged to have been rendered by plaintiff in making certain plans for defendant.

The complaint shows that the board of supervisors of Los Angeles county made an order to the effect that the board would receive plans and specifications for a jail and appurtenant buildings, the board reserving the right to reject any and all plans and specifications. The board adopted the plan of the plaintiff for a county jail, with certain provisos, among which was that the plans should not be considered adopted unless the board accepted a bid from a reliable party to the effect that such party would construct the buildings proposed for a sum not exceeding fifty thousand dollars. After this order was entered the defendant submitted certain drawings, and the clerk was directed to give notice to all persons who desired to bid upon a jail building to be erected in accordance with plaintiff's plans and specifications. In this notice the board reserved the right to reject any and all bids. The notice was published, and the plaintiff claims that bids were made by reliable parties within the required figures. Before any plans or specifications were finally adopted, the board

*For subsequent opinion in bank, see 72 Cal. 502, 16 Pac. 313.

made an order rejecting the plaintiff's plans, on the ground that he had been party to certain improper acts in getting his plans conditionally accepted, and refused to open any of the bids received, based upon said plans.

Williams & McKinley for appellant; Geo. M. Holton and Bicknell & White for respondent.

FOOTE, C.—The demurrer to the complaint was properly sustained. The plaintiff had no claim against the defendant, the county of Los Angeles, according to his own pleading, save and except one based upon the condition that the board of supervisors of that county should accept the bid of some "reliable party" for the building of a jail. They refused, in the exercise of a proper discretion, as the complaint shows, to open or accept any of the bids tendered, on the ground that the plaintiff had been a party to certain improper acts in getting his plans conditionally accepted. Thus the condition upon which alone he had, or could have had, any claim for compensation for his alleged services never happened, not because of any fault of the board of supervisors, but for the reason that they, in the exercise of a rightful discretion, refused to entertain or accept bids which they believed were based upon plans tainted with fraud, with which the plaintiff appeared to them to be in collusion. As guardians of the best interests of their county, they could not have properly acted otherwise, and the judgment should be affirmed.

We concur: Belcher, C. C.; Hayne, C.

By the COURT.—For the reasons given in the foregoing opinion judgment is affirmed.

PARTRIDGE v. OWENS.

No. 9571; May 18, 1887.

13 Pac. 856.

Appeal.—Where the Evidence is Conflicting, the findings of the trial court will be upheld on appeal.

APPEAL from Superior Court, San Francisco.

Fisher Ames and J. M. Kinley for appellant; George E. Lawrence for respondent.

FOOTE, C.—This is an action in ejectment for a lot of ground in the city and county of San Francisco. The court below gave judgment for the plaintiff, and the defendant moved for a new trial, which, being denied, he appealed from the order made in the premises.

The only real ground of objection which the defendant makes against the correctness of the action of the trial court is that the findings are not supported by the evidence. We have given a very careful examination to the record, and to briefs of counsel, and the authorities cited, but we have not been able to perceive anything therein which militates against our opinion that, the evidence being conflicting, the findings should be upheld and the order affirmed.

We concur: Belcher, C. C.; Hayne, C.

By the COURT.—For the reasons given in the foregoing opinion the order is affirmed.

TRIPP v. DUANE.*

No. 9490; May 20, 1887.

13 Pac. 860.

Trusts—Coupled With an Interest—Conveyance by Trustee.—A transfer of all his interest by one who had advanced money to pay the state's charges for a deed to salt marsh and tide lands, and who, as security for the loan, had taken a conveyance to himself of the land in trust to reconvey upon payment, and with power, upon default, to sell after notice by advertisement, is valid as a conveyance of his equitable interest, although made without such notice, and is not in contravention of Civil Code of California, section 870, providing that, "where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustee in contravention of the trust is absolutely void."

Quieting Title.—A Bill to Quiet Title to an Undivided Interest in Land will not Lie, as against the grantee of one who has advanced money to clear the property, and taken a deed in the nature of a mortgage as a security for the loan, without payment or tender of the proportionate part of the money loaned.

Trial—Reception of Evidence—Ruling on.—It is error for the court, in making up its findings, to consider a deposition which was objected to when offered, and with respect to which objection the court did not decide at the time, but reserved its ruling.

Trial — Ruling on Evidence Reserved.— Where testimony is objected to when offered, the party objecting has a right to have a ruling upon the point; and where the ruling is reserved, and the court, when making up its finding, wrongly considers the testimony, the error is not cured by tendering the objecting party a ruling upon the matter, when the statement on motion for new trial is presented for settlement.

APPEAL from Superior Court, San Francisco.

George W. Tyler and E. D. Wheeler for Duane, appellant; Philip G. Galpin for Tripp, respondent.

FOOTE, C.—An action to quiet title to thirty-three ninety-sixths of certain land described in the complaint. Some time during the year A. D. 1853, one George W. Ellis filed in the recorder's office of the city and county of San Francisco a

*For subsequent opinion in bank, see 74 Cal. 85, 74 Pac. 91.

pre-emption claim to one hundred and sixty acres of salt marsh and tide lands, the property of the state of California. In the interval between such time and October 21, A. D. 1875, Ellis executed to various persons bargain and sale deeds of undivided portions of his pre-emption claim, amounting to thirty-three ninety-sixths of the whole thereof, the grantees of such undivided interests conveyed them to the plaintiff prior to the twenty-first day of October, A. D. 1875, by deeds sufficient in form, and such deeds were recorded before said last-mentioned date. The state of California executed to Ellis a deed to the lands described in the complaint on the twenty-fourth day of November, A. D. 1875, they being but a portion of those described in the pre-emption claim heretofore mentioned. The plaintiff claims title to thirty-three ninety-sixths of the land, by reason of the pre-emption claim and the deed from the state of California to Ellis. It appears, however, that, when the deed from the state was ready for delivery, Ellis had no money, and eight thousand dollars had to be paid the state before the deed would be delivered; and Ellis, Duane and Haymond executed to one Patterson an instrument in writing, which is as follows: "We, George W. Ellis, Creed Haymond, and C. P. Duane, hereby grant, bargain, sell, and convey to Wm. H. Patterson all the estate, title, and interest which we, either and all of us, now have, or may hereafter acquire of, in and to the land described, and intended to be described in a certain so-called pre-emption claim or pre-emption notice on record, whereof is contained in the land records of the city and county of San Francisco, in Liber B of Miscellaneous Deeds, page 665; and also all the lands described in two certain deeds made by the tide-land commissioners to G. W. Ellis, and bearing date November 24, 1875. This conveyance is in trust to secure the payment of $4,000 due to said Patterson from the said Ellis, $2,000 due from the said Haymond to said Patterson, and $2,000 from the said Duane to the said Patterson, and payable in United States gold coin, with interest at the rate of one and one-half per cent. per month, and payable on or before sixty days from the date thereof. The said Patterson to have full possession and control of the said land, and the absolute power of the disposition of the said land for the purposes of the trust. If such payments are not paid at or before sixty days from the

date hereof, such disposition is to be made upon one week's notice in any daily paper published in the city and county of San Francisco. Upon the payment of the whole of said sum of $8,000 and interest, the said Patterson is to reconvey said land: or, upon the payment by the said Ellis of the sum of $4,000 and interest, he will reconvey one-half of said property to said Ellis; or, upon the payment of $2,000 and interest by said Haymond he will reconvey to said Haymond one-fourth thereof; or upon the payment of $2,000 and interest by the said Duane, to reconvey one-fourth of said property to said Duane. Witness our hands and seals this thirtieth day of November, 1875 "—the same being signed and sealed by all of said parties thereto.

The eight thousand dollars was not paid within the sixty days, as agreed by the instrument above set out; and Patterson, without advertising the sale of the land as therein provided, transferred all his interest in it to one Morrissey by deed, and Morrissey to Duane.

At the time of the commencement of the present action, neither the plaintiff nor Ellis had paid Patterson or Duane any of the said eight thousand dollars, and the complaint sought to quiet the plaintiff's title to thirty-three ninety-sixths of said land without alleging payment, or making any offer to pay to Patterson, or Duane, his grantee, any portion of the same. After Duane had filed his amended answer, the plaintiff bought of Patterson his right to and interest in the land, and took from him a conveyance therefor, and then applied to the trial court for leave (which was refused, as far as Duane was concerned) to file a supplemental complaint setting up the facts above related. But upon the trial of the cause the plaintiff offered in evidence the deposition of Patterson to prove the facts set up in the supplemental complaint. The defendant, Duane, objected, upon the ground that all the matters thus sought to be proved had occurred after the joinder of issue in the case, and were incompetent, irrelevant, and immaterial, and that no supplemental complaint had been filed touching such matters, so far as concerned the defendant, Duane. The court did not at the time admit the testimony, but reserved its ruling. Before, however, the decision in the cause was made, the court did read and consider that deposition, and in fact based its findings and decree

thereon; and decided that defendant, Duane, had no right, title, or interest in the land described in the complaint, and quieted the title of the land to the plaintiff, and as against Duane, as prayed for.

The appellant makes three points for the reversal of the judgment, and the order denying him a new trial:

First. He claims that the court erred in quieting the plaintiff's title to the whole of the land described in the complaint.

Second. That the court erred in deciding that plaintiff was entitled to prevail in the action, without paying or offering to pay thirty-three ninety-sixths of the purchase money which Patterson advanced to Ellis, Haymond, and Duane to pay to the state of California, and in ruling that Duane had no title or interest in the land.

Third. That the court erred in considering and reading evidence not admitted at the trial, and basing its findings and decree thereon.

We do not think that the court quieted the title to the whole of the land, but only to thirty-three ninety-sixths thereof. But it seems to us that the transfer by Patterson to Morrissey was valid, so far as to carry all the beneficial interest which Patterson had in the trust instrument from Ellis, Duane, and Haymond, and, as a consequence, that Duane got the same interest from Morrissey. Patterson thereby made no conveyance in contravention of the trust, within the meaning of section 870, Civil Code. He transferred all his beneficial interests only, and the title was not affected. The advertisement for the sale was not affected. It was just as incumbent on Patterson's grantee to have carried out the trust, and to have advertised as the instrument required, as it was upon Patterson. The grantees under Patterson had a right to be repaid their share of the eight thousand dollars, vesting as a lien upon the thirty-three ninety-sixths of the claim, as fully as Patterson had, and therefore it was wrong to devest Duane of the interest he had acquired under Patterson and Morrissey, without, at least, having him reimbursed, and no offer so to do was made in the complaint.

The court had no right to consider the deposition of Patterson, as against Duane, in deciding the cause. Duane never waived his exceptions, and the court, without any notice to him, or ruling upon it after it was taken, so that he might

perchance have rebutted Patterson's evidence, founded its decree and findings upon it. The fact that he was tendered an opportunity to have a ruling on the matter, when the statement on motion for a new trial was presented to the court for settlement, gave Duane no opportunity, which was his right to have, to offer rebutting testimony.

The judgment and order should be reversed and the cause remanded for a new trial.

We concur: Belcher, C. C.; Searls, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial, nunc pro tunc, as of March 15, 1887.

HALEY v. HALEY.*

No. 11,778; May 28, 1887.

14 Pac. 92.

Divorce — Cruelty — Charge of Unchastity.—A charge by a husband, in a cross-bill filed by him for divorce, that his wife was pregnant by some one other than himself when he married her, and that she concealed the fact from him, tends to cause the wife "grievous mental suffering," and is a sufficient ground to sustain a subsequent bill by the wife, where it appears that the charge was false and malicious, and that the husband's bill was dismissed.[1]

Divorce—Cruelty—Charge of Unchastity—Corroboration.—The provision of Civil Code of California, section 130, that "no divorce can be granted upon the uncorroborated . . . . testimony of the parties," has no application to a case where the wife seeks a divorce on the ground of a false and malicious charge against her by the husband of concealed pregnancy by another man at marriage, although she is the

*For subsequent opinion in bank, see 74 Cal. 489, 16 Pac. 248.

[1] **Cited** and approved in MacDonald v. MacDonald, 155 Cal. 672, 102 Pac. 930, 25 L. R. A., N. S., 45, where the causing of grievous mental suffering is held to be extreme cruelty, under the statute, even with no resulting injury to health.

Cited and approved in MacDonald v. MacDonald, 155 Cal. 673, 102 Pac. 931, 25 L. R. A., N. S., 45, in the connection that the fact of the parties living apart, at the time one gives out a scandalous report of the other, does not relieve such party of the imputation of extreme cruelty, for which, under the statute, divorce may be decreed.

only witness who gave testimony as to what her feelings about the charge were. Where the court finds that the charge was false, and there is nothing in the record to negative the fact that the wife is a pure and virtuous woman, the presumption is that such a charge had its natural effect on such a woman, and caused her "grievous mental suffering."

Divorce—Assignment of Judgment to Wife.—Where the court, upon decreeing a divorce in favor of the wife, finds that there is a judgment outstanding against her in favor of the husband, and that the judgment, which was wrongfully rendered, was for money which he had given her in consideration of the relinquishment by her of her rights in the homestead, so that he might sell it, the court may order the judgment to be assigned to her.

Divorce—Former Decree not Estoppel.—A decree dismissing a bill filed by the wife for divorce, and also dismissing the husband's cross-bill, because the charges of neither party had been sustained, does not operate as an estoppel upon the wife to bring another bill against the husband on the ground that the charges in his cross-bill, which the court had found to be false, amounted to cruel and inhuman treatment.

APPEAL from Superior Court, Los Angeles County.

In 1884, some time between June 7th, at which date the parties were married, and September 19th, Presentacion B. De Haley, respondent, commenced suit in the superior court of Los Angeles county against her husband, Salisbury Haley, appellant, for divorce. The bill was based upon a charge of "cruel and inhuman treatment, in that he had accused her of having committed adultery." This suit, which is known and referred to in this statement as No. 3449, resulted October 7, 1884, in a decree in favor of the wife of absolute divorce. A motion was made by the husband, December 16, 1884, for a new trial, which was overruled, and an appeal was thereupon taken to the supreme court which, May 14, 1885, reversed the superior court, and granted a new trial: Haley v. Haley, 7 Pac. 3. The motion for the new trial in the superior court was supported, in part, by the affidavit of the husband set out below. On May 8, 1885, the husband filed a bill for divorce against the wife. The substance of this bill is also set out below. This bill was dismissed, on advice of counsel, May 13, 1885, pending the appeal in No. 3449. When the remittitur in that case reached the superior court, the husband filed a cross-complaint containing the substance of the bill filed by him May 8, 1885, and subsequently dismissed. A supple-

mental complaint was filed by the wife, June 17, 1885, setting out the affidavit used by the husband on his motion for a new trial, and the bill filed by him, May 8, 1885, and alleging statements by him to various persons that his wife was pregnant by some one other than himself, and that she had had a child by some other than himself. This bill was demurred to, and the demurrer was sustained. The court (Brunson, J.) found January 14, 1886, as a matter of fact, among other things, "that defendant, during said marriage and before plaintiff left his house never accused her of being pregnant by some or any man other than himself, or desiring to have sexual intercourse with some or any man other than himself; nor did he taunt or accuse her of committing adultery, or of desiring to commit adultery with some or any man other than himself." As to the cross-complaint of the husband, the court found, among other things, "that at the time of said marriage, June 7, 1884, plaintiff was not actually or at all pregnant with child by the paternity of any individual." The complaint and cross-complaint were thereupon dismissed, and the divorce refused.

The wife then filed this bill, alleging in paragraphs 4, 5, and 6 as follows:

"Fourth. Plaintiff alleges that, since said marriage was consummated, the said defendant has treated the plaintiff in a cruel and inhuman manner, and particularly in this: On or about the sixteenth day of December, 1884, the said defendant filed in this court an affidavit, verified by himself, in a certain action then and there pending between plaintiff and himself, which said affidavit was thereafter read by and made known to a number of persons, and is in words and figures, to wit:

" 'In the Superior Court of Los Angeles County, State of California.

" 'Presentacion Haley,
Plaintiff,
vs.
S. Haley,
Defendant.

" 'S. Haley, being duly sworn, deposes and says that on December 12, 1884, the plaintiff in this action arrived from San

Francisco, since which time affiant has seen her numerous times, and finds that she is in an advanced state of pregnancy; and, as she appears to affiant, she is from six to seven months advanced in pregnancy; that affiant first discovered that she was pregnant in July last past, in seeing that her belly, breasts, and feet were swelling, of her having nausea in the morning, since which time affiant, on every occasion of seeing her, discovered that she was advancing in pregnancy, and on the fourth of October, at the trial of this cause, affiant discovered unmistakable signs of pregnancy in plaintiff. Affiant and plaintiff intermarried June 7, 1884, and affiant had no connection with plaintiff until June 19, 1884.

"'S. HALEY.

"'Subscribed and sworn to before me this sixteenth day of December, 1884.

"'A. W. POTTS, Clerk.

"'By A. Rimpau, Deputy Clerk.'

"All of which statements in said affidavit contained were wholly and absolutely false and malicious, and became known to many persons in this community, and were communicated to this plaintiff, by reason whereby she suffered grievous mental pain and anguish.

"Fifth. Plaintiff further alleges that on or about the eighth day of May, 1885, defendant caused to be prepared and filed in this court a complaint in a certain action entitled 'Salisbury Haley v. Presentacion Ballestero De Haley,' in which said complaint he charges plaintiff, to wit: 'That heretofore, to wit, on the seventh day of June, 1884, the plaintiff and defendant were intermarried as husband and wife. Now plaintiff shows to the court and avers that the defendant, by his inducement of this plaintiff to enter into marriage with her, perpetrated a grievous fraud upon this plaintiff, and that the defendant did willfully deceive and cheat this plaintiff as to the defendant's capacity to fulfill the duties, obligations, and ordinary incidents of marriage, in this: That at the time of the intermarriage of plaintiff and defendant, on the seventh day of June, 1884, as aforesaid, this defendant was in fact, unknown and unsuspected by this plaintiff, actually pregnant with child by some person other than this plaintiff, and that this plaintiff was entirely ignorant of the fact of this

defendant's pregnancy at the time of the intermarriage of plaintiff and defendant as aforesaid. And plaintiff avers that such pregnancy of this defendant was not by this plaintiff, and plaintiff avers that he never had sexual intercourse with defendant prior to the marriage of plaintiff and defendant on the seventh day of June, 1884, as aforesaid.'

"Sixth. That each and every of said allegations and statements were false, unfounded, and malicious, and were made by the said defendant for the sole purpose of grieving the said plaintiff, and that, before the commencement of this action, the same were made known to this plaintiff, and that thereby she was subjected to great shame, and to grievous mental anguish and suffering, and was made sick, and her life rendered miserable and wretched. Wherefore plaintiff prays judgment."

There was a demurrer to the complaint, which was overruled. The husband then filed a cross-complaint, alleging desertion. On May 3, 1886, the court passed a decree dissolving the marriage, allowing the wife to resume her maiden name, and awarding her fifteen hundred dollars and costs. The decree was based on the following findings of facts:

"(1) That all the allegations of the complaint herein are true, and that the articles set forth in said complaint as cause of action are complete, are not misleading, nor are they mutilated.

"(2) The judgment made and entered in the action of P. B. De Haley v. S. Haley on January 14, 1886, in said court, was not and is not an adjudication of any of the matters charged in the cross-complaint in this action, or of any of the issues tendered thereby.

"(3) That on the eighth day of April, 1886, the defendant herein filed a cross-complaint against the plaintiff praying for a decree of divorce upon the ground of desertion.

"(4) That the allegation of desertion pleaded in said cross-complaint is true.

"(5) That plaintiff and defendant intermarried on the seventh day of June, 1884, at the city and county of Los Angeles, state of California; that after said marriage, and on the same day, the defendant filed his homestead declaration upon certain lands and premises situated in said city of Los Angeles, and upon which he and the said plaintiff then resided;

that said homestead declaration was in all respects duly made, certified, and recorded as the law required; that on the trial of the cause of P. B. De Haley v. S. Haley (No. 3449), this court awarded to the defendant, S. Haley, the said homestead, and to the plaintiff, P. B. De Haley, the sum of fifteen hundred dollars, for and on account of her interest therein; that subsequent to said decree, and while the same was in full force, the said S. Haley, being desirous of selling said homestead property, paid to the plaintiff herein the said sum of fifteen hundred dollars, whereupon, and by reason of such payment, this plaintiff made, executed, and delivered her abandonment of said homestead in due form of law, and quitclaimed all her right, title, and interest therein, as directed by the said S. Haley. Thereafter the said judgment was, on appeal to the supreme court, reversed, and the cause remanded for a new trial, and said action was thereafter, and after the filing in this court of the remittitur from the supreme court, tried, and the prayer of the complaint denied; that subsequent to such determination of said action, the said S. Haley commenced an action in this court against the plaintiff herein for the recovery of the said sum of fifteen hundred dollars so as aforesaid awarded to her in lieu of her interest in the said homestead property, and the action herein last above referred to came on regularly for trial, and thereupon, to wit, on the twenty-first day of April, 1886, a judgment in favor of S. Haley, plaintiff, and against the said P. B. De Haley defendant was duly made, given, and entered; and it appearing to the court that the money for which said last-named judgment was given, equitably and of right represented the interest of the said P. B. De Haley in and to the homestead so declared as hereinbefore found, it is further found that plaintiff herein is entitled to have awarded to her, as and for her interest in the estate and homestead of the defendant, S. Haley, the said judgment of fifteen hundred dollars and costs, and the whole thereof, rendered as aforesaid on, to wit, the twenty-first day of April, 1886."

The husband thereupon took this appeal.

S. Haley and D. Lyons for appellant; Hupp & Glowner for respondent.

FOOTE, C.—Mrs. Haley instituted an action for divorce against her husband, Salisbury Haley. She alleged and proved that, in a former action for divorce instituted by him against her, he had, in his pleading and affidavits filed in the cause, charged her falsely and maliciously, and for the purpose of grieving her, with having been pregnant at the time of their marriage by a man other than himself, and that she had concealed her condition from him, and by such concealment induced him to marry her. The averments of the complaint were found to be true.

We think that such a charge tends to cause "grievous mental suffering," and comes within the rule laid down in Powelson v. Powelson, 22 Cal. 358. The plaintiff testified that it did in fact cause her grievous mental suffering. It is contended, however, that, inasmuch as no other witness gave evidence as to what her feelings were, her testimony on this point is uncorroborated. But the court finds that the charges were false, and there is nothing in the record to negative the fact that Mrs. Haley was a pure and virtuous woman. This being the case, we think the presumption is that the charge had its natural and usual consequence, and that it is no more necessary to prove that it induces suffering than to prove that bodily injury is followed by pain. The court was entirely justified in its finding on that point.

The judgment made and entered in a former action between these same parties was not such an adjudication of the matters set up by the cross-complaint in the present action as would bar the plaintiff's right of recovery; for, although Mr. Haley's charges against his wife of a want of chastity, etc., had been previously passed upon by the trial court in the former action, yet that court found adversely to him on the point, and repudiated the charge as being untrue. Therefore it would be a violation of Mrs. Haley's legal right to say that because her husband had in that first action made groundless and cruel charges against her, on which the court had fixed the seal of disbelief, that she, in this action, may not, by her complaint, make such charges so made the proper basis of present judicial inquiry, with a view to determine whether such conduct on his part did or not entitle her to seek for and obtain a divorce from him.

We perceive no error in the trial court's assigning to her the judgment for fifteen hundred dollars, which her husband had formerly obtained against her; for to enforce that judgment would have been inequitable, since the money, which was the basis of the action wherein that judgment was recovered, had been voluntarily given to her by him on the settlement of a former suit, and he had no just right to recover it back.

Upon the whole record, we observe no prejudicial error, and the judgment and order should be affirmed.

We concur: Belcher, C. C.; Hayne, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

FRANKEL v. DEIDESHEIMER.

No. 11,573; June 29, 1887.

15 Pac. 429.

Deed—Consideration—Presumptions.—Where the Evidence was Clear and unequivocal that a deed was made on or within a day or two of October 15, 1883, and there was no evidence to show that the property conveyed had at the time a market value in excess of the amount paid, and there was no evidence of fraud, held, that a finding of fact to the contrary, based upon presumptions, could not be sustained.

APPEAL from Superior Court, Sierra County.

Freeman, Bates & Rankin, Hundley, Gage & Ford, S. B. Davidson and Stanley A. Smith for appellant; P. Van Clief for respondent.

By the COURT.—We are of opinion that the evidence is insufficient to justify the findings of fact in the court below in the following particulars, viz.: That the location of the Willow quartz lode was made at the request or for the use or benefit of the defendant, Philipp Deidesheimer; that Deides-

heimer conveyed an undivided half of the American quartz lode to Busch on the 21st of April, 1884, or at any other time than within a day or two of October 15, 1883; that the deed from Deidesheimer was antedated; that the deed was executed or accepted with the intent or for the purpose of hindering, delaying, or defrauding any creditor of said Deidesheimer; that at the time the deed was executed an undivided half of the American quartz lode was of the apparent or market value of four thousand dollars, or of any sum exceeding one dollar; that Deidesheimer transferred any interest in the American quartz lode, or in the Young America Consolidated Mining Company, for the purpose of, or with the intent of, hindering, delaying, or defrauding any creditor; that the consideration for the issuance and delivery of stock to Matilda Deidesheimer and Philipp Deidesheimer was that Busch should convey to any corporation an undivided half of the American quartz lode mining claim; that the issuance and delivery of shares of stock to said Matilda Deidesheimer, and the conveyance by Busch to the corporation, were directed, caused, or procured by said Philipp for any purpose, or at all; that said Matilda, without consideration, assigned or transferred to the defendants Julia and Ritza Betts any shares of stock; that such transfer was made for the purpose, or with the intent, thereby to defraud or cheat plaintiff, or that said Julia and Ritza had notice of such purpose or intent.

The evidence that the deed from Deidesheimer to Busch was executed on or within a day or two of October 15, 1883, is clear and unequivocal, and there is no evidence substantially in conflict therewith; the argument to the contrary is based upon presumptions arising out of presumptions. There is no evidence that at the time of the conveyance the property conveyed had a market value in excess of the amount paid by Busch. The evidence shows that, at the time of the location of the Young America claim, Deidesheimer's name was inserted in the notice of location by Busch as an act of friendship; and that as soon as Deidesheimer made an examination of the ground he declared his intention not to abide by the location, and offered to and did execute to Busch a deed of the property; and that not until some months after the delivery of the deed did the claim have any apparent or market value. We find no evidence of any fraud on the part of either of the

defendants; on the contrary, the facts displayed by the evidence show that their transactions were in good faith.

Judgment and order reversed and cause remanded for a new trial.

GRANT v. DE LAMORI and Others.*

No. 11,712; June 30, 1887.

14 Pac. 314.

Deed—Title Conveyed.—The Alienating Force of a Deed, which by plain terms purports to pass the grantor's entire interest, is not restricted by the fact that it contains an allusion to an executory contract which the grantor has with a third party respecting the land, and from whom he is to get a quitclaim deed, when the allusion is made simply for the purpose of describing more particularly the premises conveyed.

APPEAL from Superior Court, Los Angeles County.

Suit by John Grant, respondent, to quiet title in himself to a tract of land, against the administratrix and children of Louis Lamori, deceased. The plaintiff claimed title under a deed to him from Francisca Urquidez de Lamori, the widow of Louis, and a deed made to her by her husband in his lifetime. The defendant and appellant Mrs. Plummer claimed title as one of the heirs at law of Louis Lamori. The complaint is as follows:

"That the said plaintiff is the owner in fee simple of all that certain piece or parcel of land situate in the county of Los Angeles, state of California, forming part of the Rancho Los Feliz, and bounded and more particularly described as follows [describing it]; that the said defendants, Francisca Urquidez de Lamori, administratrix of the estate of Louis Lamori, deceased, Juan Lamori, Miguel Lamori, Alfredo Lamori, Domingo Lamori, Fabio Lamori, Solomon Lamori, Antonio Lamori, Umpara Lamori de Plummer, and Louisa Lamori de Urquidez, claim an interest or interests in said land and premises adverse to the plaintiff; but said claims of said defendants are without any right whatsoever, and that

*For former opinion, see 71 Cal. 329, 12 Pac. 228.

the defendants have not, nor has either of them, any estate, right, title, or interest of, in, or to said land and premises, or any part thereof; that the said Louis Lamori died in the said county of Los Angeles on the eighth day of January, 1881, being at the time of his death a resident of said county; that by an order of the superior court of said county, duly made and given on the seventh day of July, 1881, the said Francisca Urquidez de Lamori was appointed administratrix of the estate of said Louis Lamori, deceased, and thereupon said Francisca Urquidez de Lamori duly qualified as such administratrix, and letters of administration upon said estate were duly issued to her by the clerk of said court, under the seal thereof, which letters have not been revoked; and that said Francisca Urquidez de Lamori thereupon entered upon the discharge of the duties of her trust, and ever since has been, and still is, administratrix of the estate of said Louis Lamori, deceased; that the said Louis Lamori left him surviving, as his sole heirs at law, his widow, the said Francisca Urquidez de Lamori, and his children [naming them]; that the said Francisca Urquidez de Lamori, as administratrix of the estate of the said Louis Lamori, deceased, and the said surviving children of said deceased, claim that the land and premises above described were owned in fee simple by the said Louis Lamori at the time of his death, and that the said land and premises now form and are a part of the estate of said deceased, which said claims are without any right whatever, and said land and premises were not, nor was any part thereof, or interest therein, owned by said Louis Lamori at the time of his death, nor do said land and premises, or any part thereof or interest therein, form any part of the estate of said deceased.

"Wherefore plaintiff prays judgment that said defendants claiming interests in said land and premises as aforesaid may be required to set forth the nature of their several claims, and that all adverse claims of the said defendants, or either of them, may be determined by a decree of this court; and that by said decree or judgment it be declared and adjudged that said plaintiff is the owner in fee simple of said land and premises, and that said defendants claiming interests therein, as aforesaid, have not, nor has either of them any right, title, interest, or estate whatsoever, of, in, or to the said land and premises, or any part thereof; and also that said defendants,

claiming interests therein as aforesaid, and each of them, be forever debarred from asserting any claim whatever in or to said land and premises, or any part thereof, adverse to the plaintiff; and that by said decree it be declared and adjudged that neither the said land and premises, nor any part thereof, nor any interest therein, form any part of the estate of said Louis Lamori, deceased; and also that said estate has no interest in said land and premises, or any part thereof; and for such other and further relief as to equity shall seem meet."

The following was put in evidence by the plaintiff:

"Los Angeles County, Tuesday, May 31, 1881.

"Know all men in this presence that I Luis Lamorez of the county of Los Angeles state of California I party of the first part confirm to and give all my interest and right which I may have or can have in a right of 22 acres of land being located and situated in the ranch of Lick or Los Feliz rancho a right to Francisca Lamorez party of the second part of the same county and state being all my interest and right Thomas Rowan the representative and agent to arrange and deliver the title at the end of the settlement of the Rancho of Lick in the bargain which I confirm and certainly give to Francisca Lamorez party of the second part. Our terms are in the certificate or paper security in this paper are stipulated the location and courses for said piece of land above mentioned I say I assign and confirm to and give all right to Francisca Lamorez.

"LUIS his X mark. LAMOREZ.

"In the presence of the "HENRY B. KATZ.

"PEDRO D. his X mark. LOPEZ.

"E. R. PLUMMER."

The arrangement referred to with Thomas Rowan was as follows:

"T. E. Rowan & Co., Real Estate and Commission Agents. Office, 75 Downey Block, Los Angeles, Cal.

"December 20, 1880.

"In consideration of Louis Lamoreux giving to the James Lick trustees a deed to all his right, title, and interest in the

Lick tract of the Los Feliz rancho, except 20 acres as reserved by said Lamoreux in said Lick tract of the Los Feliz ranch by said deed, I agree, on the arrival of R. S. Floyd, of the Lick trust, in San Francisco, to get a deed from the Lick trustees to Louis Lamoreux of the 20 acres as reserved by him in his deed to the Lick trustees.

"THOS. E. FRAZER,
"Agent for the Lick Trustees."

The deed from the widow to the plaintiff was also put in evidence. The defendant offered in evidence a deed from one Ramon Vejar to Louis Lamori, as tending to prove that Louis Lamori's estate, of which he was so seised in fee simple on the said thirty-first day of May, 1881, was by a title other than that which was expected to accrue from the Rowan executory contract; and that, although Louis Lamori at that time assigned to his wife all the estate or interest which might accrue from that contract, still the estate or interest which he had prior to that time by another title remained to him, notwithstanding his assignment of that contract to his wife on the said 31st of May; and that he died seised of that prior estate in fee on the following eighth day of June, as alleged in the answer.

The court found that on May 31, 1881, "Louis Lamori, by deed of conveyance, duly conveyed all of said tract of land to the defendant Francisca Urquidez de Lamori who thereafter, and prior to the commencement of this action, by deed of conveyance, duly conveyed all of said tract of land to the plaintiff, John Grant."

H. Allen for appellants; Howard & Scott for respondent.

SHARPSTEIN, J.—Tested by what we conceive to be now the well-settled rule in this state, the complaint states facts sufficient to constitute a cause of action. The demurrer to it was properly overruled.

As we construe the deed of Louis Lamori, it conveys all his interest in the land to his wife. The contract with the trustees of the Lick estate is clearly referred to in the deed for the purpose of describing more definitely the premises conveyed, and it makes no difference what its legal effect might be. No one connected with this action claims anything under it. The

objection to its introduction in evidence was properly overruled. The deed of Louis Lamori to Vejar, of a date subsequent to that made to Mrs. Lamori, was wholly immaterial, and the objection to its introduction in evidence was properly sustained.

We discover no error in the record. Judgment and order affirmed.

We concur: McFarland, J.; Thornton, J.

CUMMINGS v. CUMMINGS and Others.*

No. 11,881; 1887.

14 Pac. 562.

Divorce—Joinder of Parties and Causes of Action—Fraudulent Conveyance.—With a suit for divorce, plaintiff also joined an action for the division of community property, uniting Ketchum, Simpson, and the Bank of Watsonville as defendants. The complaint alleged that, during the coverture of plaintiff and defendant Cummings, the latter acquired, by the joint efforts of himself and wife, a quantity of real estate, which was community property, and part of which, without the knowledge or consent of plaintiff, he attempted to convey to defendant Ketchum; that this was done with the purpose and intent on the part of both parties to the conveyance to defraud plaintiff of her rights in the property; that the conveyance was without consideration; that the Bank of Watsonville claims some interest in the property by reason of a mortgage thereon, given by Ketchum, but that the mortgage was taken with knowledge of the fraud of the above-named defendants, and for the purpose of assisting in carrying it out; that said Simpson claims an interest in the land, but that his interest or claim is subordinate to plaintiff's interest therein. Defendants Ketchum and the Bank of Watsonville demurred, on the grounds (1) that several causes of action were improperly united; (2) that there was a misjoinder of parties defendant. Held, that the demurrers should have been sustained.

Husband and Wife—Action Between—Fraudulent Conveyance. An action to set aside the conveyance of community property made by a husband, on the ground of fraud, cannot be maintained by the wife while the marriage bond exists.

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*For subsequent opinion in bank, see 75 Cal. 434, 17 Pac. 442.

APPEAL from Superior Court, Santa Cruz County.

A. S. Kittredge for appellant; Thomas H. Laine, Goldsby & Jetter and Z. N. Goldsby for plaintiff.

THORNTON, J.—This action is brought by the plaintiff, Mary R. Cummings, against her husband, William N. Cummings, defendant, for a divorce from the bonds of matrimony, and for a division of the community property, etc. Morgan L. Ketchum, James L. Simpson, and the Bank of Watsonville were also made defendants.

It is averred in the complaint that, during the coverture of plaintiff and defendant Cummings, the latter acquired, by the joint efforts of plaintiff and defendant just above named, a large amount of real property in the city of Santa Cruz, of the value of sixteen thousand dollars or thereabouts, which was community property, and that a portion of the property was a lot situate in the city of Santa Cruz, which is particularly described in the complaint. It is further averred that defendant Cummings, by an instrument in writing by him signed, acknowledged, and delivered on the 18th of May, 1876, in form a deed of conveyance, without the knowledge, approbation, or consent of plaintiff, purported to convey to defendant Ketchum the lot of land above mentioned, in which instrument eight thousand dollars is stated as the consideration thereof; that Cummings and Ketchum, in the execution and delivery of the pretended conveyance, combined and confederated willfully for the purpose and with the intent to defraud plaintiff of her rights and interest in and to said property, and to fraudulently cover up and conceal the legal title for the sole use and benefit of defendants Cummings and Ketchum; that said conveyance was without consideration, and that no part of it was ever paid or ever agreed to be paid by Ketchum to Cummings; that the whole scheme is a contrivance to defraud plaintiff of her rights and interest in the property aforesaid.

As to the Bank of Watsonville, it is alleged that it has or claims to have some interest in the lot above mentioned; that its claim is based on a mortgage executed by Ketchum to it, dated on or about the sixteenth day of August, 1881; that said mortgage was taken with knowledge of the fraud of

Ketchum and Cummings above set forth, and with the intent to enable Ketchum and Cummings to carry out the fraud aforesaid; that defendant Simpson has or claims to have some interest in the lot in controversy, but said interest is subordinate and subject to the interest of plaintiff in said lot. A like averment as that just preceding is made as to the interest of the Bank of Watsonville.

Ketchum and the bank demurred to the complaint on the following among other grounds: (1) That several causes of action have been improperly united, to wit, an action for a divorce, and an action based on a fraud alleged to have been committed upon plaintiff's marital community rights, said fraud being wholly without relation to, connection with, or anticipation of, a divorce, or any proceedings therefor. (2) That there is a misjoinder of parties defendant—William N. Cummings, defendant in an action for divorce, and these defendants as parties to an alleged fraud upon plaintiff's marital community rights—said fraud being wholly without relation to, connection with, or anticipation of, a divorce, or any proceedings therefor. The demurrer was overruled, and the cause proceeded to trial. A nonsuit was granted as to the bank, and a judgment was rendered adverse to Ketchum.

It is contended that the demurrer on the grounds above mentioned should have been sustained, and we concur in this contention. The joinder of causes of action is governed by section 427, Code of Civil Procedure. That section is as follows:

"The plaintiff may unite several causes of action in the same complaint, where they all arise out of (1) contracts, express or implied; (2) claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; (3) claims to recover specific personal property, with or without damages, for the withholding thereof; (4) claims against a trustee by virtue of a contract, or by operation of law; (5) injuries to character; (6) injuries to person; (7) injuries to property. The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be

united with an action for either an injury to character or to the person."

We do not find the causes of action here united, viz., an action for a divorce and an action to set aside a conveyance on the ground of fraud, to belong to any of the classes of action allowed to be united by the above section. Nor can Ketchum or the bank be made defendants in such a cause as this. They have no concern in the action for a divorce between plaintiff and her husband.

Furthermore, we are of opinion that the action to set aside a conveyance of the community property made by the husband, on the ground of fraud, cannot be maintained by the wife while the marriage bond exists. The reasons for this conclusion are given in Greiner v. Greiner, 58 Cal. 119, 121, where the point is decided. We think the ruling in that case is correct, and should be adhered to. The action which the wife can probably maintain during coverture is set forth in Greiner v. Greiner, 58 Cal. 121. When a decree of divorce has been obtained, the plaintiff can bring an action to redress any such wrong as she alleges she has sustained by the conduct of Ketchum. The court erred in not sustaining the demurrer to the complaint.

The appointment of the receiver is without any ground to sustain it. Ketchum was a mortgagor in possession, with the right to collect the rents and profits. It is found that he had committed no fraud. He had a right to retain the whole property as security for the payment of the amount due him, and there was no ground to deprive him of the possession of any portion of the lot involved herein.

The judgment is reversed and the cause remanded, with directions to discharge the receiver on his properly accounting, and to sustain the demurrer as to Ketchum. Ordered accordingly.

We concur: McFarland, J.; Sharpstein, J.

LEVY v. BURKLE and Others.

No. 11,967; July 27, 1887.

14 Pac. 564.

Trust Deed—Fraud as Defense.—**In an Action to Foreclose a Trust Deed,** where the answer set up that the property conveyed was the separate property of the wife; that her husband had been arrested on a criminal charge, and obtained bail; that he became financially embarrassed; and that the wife signed the trust deed upon the representations made to her by her husband and the plaintiff, who was a creditor of the husband and one of his bondsmen, that unless she signed the deed the bondsmen would withdraw, and her husband would have to go to jail, and would probably be convicted, and go to the penitentiary, and that by signing the deed she would not lose anything, and that the deed would not devest her of her homestead: held, that a demurrer to such answer was properly sustained.

Trust Deed—Order of Sale—Right of Redemption.—A court has no authority to order a sale of property without the right of redemption given by statute; and it makes no difference whether the security under which the sale is ordered is a mortgage or a trust deed.

APPEAL from Superior Court, Los Angeles County.

This was an action to obtain an order to sell certain property under a trust deed. The complaint alleges that, on the 23d of May, F. Burkle, one of the defendants, was indebted to sundry persons in about the sum of three thousand dollars; that on that day he entered into an agreement with his creditors to pay to the plaintiff, Levy, as trustee, the amounts of his debts, in twelve monthly installments; that, to secure the payment of said sums, Burkle and his wife, Elizabeth Virginia Burkle, executed a trust deed to Levy; that in October, 1885, the Burkles commenced an action against Levy to have the trust deed vacated and set aside on the ground of fraud; that a judgment was rendered against them in this action, and subsequently they commenced another suit against Levy to have the deed vacated on the ground that the land conveyed was the homestead of defendants, and the separate property of the wife, and that the wife had been induced to sign the deed by fraud and undue influence; that the Burkles had declared that they intended to harass perpetually said Levy by

litigation; that the threats, the bringing of the second suit, and the possession of the property by the Burkles, tend to cloud plaintiff's title, as such trustee, and he prays that the title of the trustee be declared good, and the trust property be sold without the right of redemption.

The defendants demurred to the complaint. The demurrer was overruled, and they answered, denying the alleged threats to harass plaintiff, and setting up as new matter, by way of separate defense, that at the time of the execution of the trust deed the property conveyed was the separate property of the wife, and the homestead of herself and husband; that the wife executed the trust deed through fraud and undue influence on the part of the plaintiff. The fraud relied on was that on the 2d of May, 1884, her husband, who was a merchant in San Pedro, Los Angeles county, assaulted one Jones, and was arrested and taken to Los Angeles; that upon securing bail he was again arrested on a second complaint by Jones, and again compelled to give bail; that, from that time until the date of the execution of the trust deed, he was engaged in preparing to defend these proceedings; that his attorney and friends had told him that he would probably be convicted, and go to the penitentiary; that he became financially embarrassed, and his creditors began to harass him; that Levy, the plaintiff, who was one of the creditors, and a trusted adviser, suggested that he and his wife join in a deed of all her property to him (Levy) in trust, to conciliate the other creditors; that he was given to understand that his bondsmen (Levy and one Jacoby), both creditors, would withdraw from the bond, and he would have to go to jail, unless the deed was given; that prior to the date of the execution of said trust deed he confided to his wife all his troubles, as they were known to himself and Levy; that in consequence she became greatly agitated and unfitted for business, and while in this condition she was asked by Levy, he at the time knowing her condition, to attend a meeting of her husband's creditors, and was then asked to sign the trust deed; that she refused to do so until told by her husband and Levy that by so doing she could relieve her husband from his embarrassments, and that she would not lose anything thereby, and that the deed would not devest her of her homestead; that it was only upon the faith of these assurances that she signed the deed; that all

the representations so made by her husband and Levy were intentionally and deliberately false on the part of said Levy. To this answer the plaintiff demurred, which demurrer was sustained, and defendants appealed.

P. W. Dooner for appellants; Chapman & Hendrick and Graves & O'Melveny for respondent.

THORNTON, J.—The demurrer to the answer of defendant Elizabeth Burkle was properly sustained. We are of opinion that there is error in the judgment in the direction for the sale of the property without the right of redemption. The right to redeem is given by statute, and the defendant cannot be deprived of it by the court. It makes no difference that the security here involved is a deed of trust. It was held at an early day in Kent v. Laffan, 2 Cal. 595, and ever since, that the statutory redemption applied to a sale on foreclosure of a mortgage. If it applies to a mortgage, it as well applies to a deed of trust. Both are securities only. The difference is only in form. In one case the mortgagee is the trustee; in the other a third person.

The judgment is ordered to be modified in the court below by striking out the direction for the sale without the right of redemption, and when so modified will stand affirmed. Ordered accordingly.

We concur: McFarland, J.; Sharpstein, J.

HOUGHTON v. ALLEN.

No. 12,047; August 5, 1887.

14 Pac. 641.

Mortgage — Validity — Mortgageable Interest — Contract for Title.—J. and R. entered into an agreement to sell A. certain lots, the consideration to be paid part in cash, and the balance in installments at one and two years. By the contract it was provided that if A. failed to pay either installment when due, J. and R. would be released from performance on their part, time being of the essence of the con-

tract; but in such case it was the duty of J. and R. to sell the lots at auction to the highest bidder, and out of the money received to pay off the amount still due on the contract, and expenses. A. went into possession of the lots, built a house thereon, and occupied them for over a year. Some months before the first installment became due, A. mortgaged the lots to H. The mortgage was duly recorded. About five months after the execution of the mortgage, A. gave possession of the lots to D., and requested J. to make the deed for them to D., which he did. In an action by H. to foreclose his mortgage, held, that A. had a mortgageable interest in the lots, and that D. took them subject to the mortgage; J. and R., by conveying to him on A.'s request, having waived any breach of the contract.

APPEAL from Superior Court, San Francisco.

Beatty, Denson & Oatman for appellant; A. P. Catlin for respondents.

PATERSON, J.—On August 22, 1870, Jackson and Rulofson, being the owners of lots 6, 7 and 8, in block 1, in the town of Davisville, executed and delivered to defendant Allen a contract agreeing to sell said lots to him for the sum of two hundred and fifty dollars, and to convey the same on the twenty-second day of August, 1872. The sum of fifty dollars was paid down and the balance was to be paid in two installments of one hundred dollars each—one August 22, 1871, the other August 22, 1872. It was provided that, if Allen failed to make either of said payments, then the said parties of the first part should be wholly released from performance on their part, time being of the essence of the contract. "But in that case," the contract reads, "it shall be the duty of the parties of the first part to sell the above-described premises at public auction to the highest bidder for cash, and out of the moneys received from such sale to pay and discharge the amount remaining due upon this contract, and the expense of such sale, rendering the overplus, if any, to the said party of the second part, his executors or assigns." In default of payments, Allen was to peacefully surrender possession of the property, but until breach of the contract he was to occupy and enjoy the use of the premises. The agreement was not recorded until July 9, 1872; but immediately after the execution and delivery of the contract Allen went into possession of the property, placed a house thereon, and continued to occupy and

enjoy the premises until on or about January 12, 1872. On April 6, 1871, Allen executed and delivered to plaintiff the mortgage referred to in the complaint, and which includes the said lots 6, 7 and 8. This mortgage was recorded April 7, 1871. Allen made no payment of the purchase price except the first one, fifty dollars.

On or about the twelfth day of January, 1872, the defendant Allen surrendered the possession of the said lots 6, 7 and 8 to the defendant William Dresbach, and wrote a letter to the said J. P. Jackson, requesting him to convey the said property to William Dresbach instead of to him (Allen), and on the twelfth day of January, 1872, the said Jackson made, executed and delivered to the said Dresbach a deed of said lots, which contained this recital: "The premises now herein conveyed being the same for which a bond for deed was heretofore given to Thomas Allen, and this conveyance is now made to said Dresbach at the instance and request of said Allen." This deed was recorded February 24, 1872. The debt that was secured by the mortgage of April 6, 1871, was never paid, and in due time the mortgagee (plaintiff herein) brought his suit to foreclose his mortgage, making Allen and Dresbach defendants. Allen suffered default, and Dresbach answered, averring that prior to April 6, 1871, the title to the lots in controversy was in John P. Jackson; that Jackson had deeded to him, and that he held a good title to the lots, free from and not subject to plaintiff's mortgage. The court concluded that said lots 6, 7 and 8 were not subject to the lien of the mortgage, and judgment was entered accordingly.

The interest held by Allen at the time he executed the mortgage to plaintiff was the subject of mortgage. Section 2947 of the Civil Code provides that "any interest in real property which is capable of being transferred may be mortgaged," and the interest of one who holds a contract or bond for title is within the rule of law thus declared: Jones v. Lapham, 15 Kan. 540; Laughlin v. Braley, 25 Kan. 147; Crane v. Turner, 67 N. Y. 437; Smith v. Patton, 12 W. Va. 541; 2 Story's Equity Jurisprudence, sec. 1021.

Under the contract, Allen had been put in possession of the premises by the vendors. He had made one payment, built a house on the land, and at the time he executed the mortgage had at least four months' undisturbed possession before him.

When he delivered possession and requested his vendors to make the deed to Dresbach he still held the undisturbed possession of the lots. The recitals in the deed from Jackson to Dresbach, and the possession of Allen which was delivered by him to the latter, were sufficient to put Dresbach upon inquiry and to charge him with notice of the facts, notwithstanding the fact that the contract was not at that time of record. The transaction was, in effect, a sale by Allen and Jackson to Dresbach, with full notice of the contract and of Houghton's lien, and Dresbach thereafter stood in no better position to defeat the lien of plaintiff than Allen would if he had completed the purchase.

It is claimed by respondent that the mortgageable interest held by Allen was subject to be determined in the event of a breach; that this interest ceased upon failure to pay the installment due August 22, 1872; and that Allen's request to Jackson to convey to Dresbach was a waiver of his right to require a sale at auction. But so long as Jackson was satisfied to allow Allen to remain in possession without payment of the first installment, there was no breach of the contract and no determination of the interest held by Allen. So far as the record shows, there was no demand made upon Allen for the installment due August 22, 1871, or refusal on his part to pay. By acting upon Allen's request to convey to Dresbach, Jackson recognized the right of Allen to control the deed, and this, of itself, was a waiver of the forfeiture for nonpayment. Under these circumstances, Jackson could not complain and the rights of Dresbach could not be enlarged over those of Jackson in consequence of the deed from the latter to the former: Baker v. Bishop Hill Colony, 45 Ill. 264.

We do not think that Allen could waive any right under the agreement, after the execution and delivery of the mortgage, which would operate to devest the mortgagee of his security. After pledging all the rights he held under the contract to Houghton as security for the payment of his obligation to him, he could not in equity destroy the effect of that security by a voluntary surrender or waiver which had neither consent nor consideration to support it. It may be admitted, as claimed by respondent, that, as between vendor and vendee, the vendor, after refusal by the vendee to complete the purchase, may sell and may recover possession; that the vendee, refusing to go on

with his payments, after paying part, forfeits the payments made, and the vendor may bring ejectment or alienate; and also that time was of the essence of this contract. All these contentions may be conceded, yet the facts remain that the vendors here acquiesced in the continued possession of the property by the vendee, and recognized his rights under the contract to control the deed; that while rightfully in possession under contract for title, and before the lapse of time for payment of installments, he had mortgaged the premises to plaintiff, and that Dresbach knew or had notice of all these facts.

In speaking upon the question of the rights of parties similarly situated, but under a parol agreement to purchase, the New Jersey court of chancery said: "They [the purchasers by parol] did not pay the five hundred dollars, as was stipulated by the agreement, on the 1st of April. But in May they paid upward of nine hundred dollars, and Allen [vendor] accepted and thereby waived all difficulty as to time. They had a right to a conveyance of the property upon their securing the balance of the purchase money according to the agreement. Can there be a doubt but that they might have assigned their benefit in this agreement to the complainants and placed them in their stead in their relationship to the property, and as to their right of conveyance from Allen? If such an assignment would have been valid, and could have been enforced in equity, I cannot see how the mortgage can be invalid. . . . . They had a beneficial agreement, which, beyond all doubt, they had the right to assign. They meant to do this, and to carry out that intention executed the mortgage in question. This court will not permit them to defeat that intention and defraud other parties upon the technical ground that there was no title or estate vested in them to mortgage. The equities of the complainants under the mortgage were that they had the right, if the Armitages [purchasers] refused to fulfill the agreement with Allen themselves, to assume his position, and redeem the property. Neither Allen nor the Armitages could defeat that right. If Allen had called upon them to carry out the agreement, and they had refused or neglected, he might then have disposed of the property free from their lien. But he could not covertly or without notice to them defeat their mortgage, or, rather, de-

prive them of their equities": Sinclair v. Armitage, 12 N. J. Eq. 177.

And so in this case, while a mortgage in this state is not an assignment, and while we do not think that the vendor or anyone else was bound to notify the plaintiff, or call upon him to carry out the agreement, yet the parties, Jackson, Allen and Dresbach, could not by an agreement among themselves deprive the plaintiff of his equities, among which was the right to have the property sold at auction to the highest bidder, in case of default in making payments, and, after payment of the balance due upon the contract, have the overplus, if any, applied to the satisfaction of the mortgage. Plaintiff had the right to assume that the contract would be carried out in all respects, and the purchaser, not being in default at the time of the execution and delivery of the mortgage, could not stipulate away this right, after receiving plaintiff's money (nine hundred and twenty-one dollars and seventy-five cents) upon the faith and security of the contract.

Judgment reversed, with directions to the court below to modify the decree of foreclosure and sale so as to include said lots 6, 7 and 8, and to have the proceeds, or so much as may be necessary, applied to the satisfaction of plaintiff's mortgage.

We concur: McKinstry, J.; Temple, J.

HAMMEL v. STONE.

No. 12,045; August 15, 1887.

14 Pac. 675.

Appeal—Order Granting New Trial—Intendment.—On appeal from an order granting a new trial, made by a judge other than the one who presided at the trial of the cause, on the ground that the evidence was not sufficient to support one of the findings of fact, every intendment prevails in favor of the correctness of such order, and such intendment must be overcome by an affirmative showing of error, and an abuse of that sound legal discretion which the lower court was called upon to exercise in relation to the matter, in order to justify a reversal of such order by the appellate court.

APPEAL from Superior Court, Santa Barbara County; D. P. Hatch, Judge.

Wells, Van Dyke & Lee for appellant; B. F. Thomas for respondent.

FOOTE, C.—This is an appeal from an order granting a new trial, made by a judge other than the one who presided at the trial of the cause. The order was made upon the ground that the record did not show sufficient evidence to support one of the findings of facts. Every intendment prevails in favor of the correctness of such an order, made in the manner above specified, and such intendments must be overcome by an affirmative showing of error: Blum v. Sunol, 63 Cal. 341. It is the well-settled rule of this court that unless the court below is shown to have abused that sound, legal discretion which it is called upon to exercise in relation to such a matter, its order in the premises will not be disturbed: Savage v. Sweeney, 63 Cal. 340; Breckenridge v. Crocker, 68 Cal. 403, 404, 9 Pac. 426, and cases there cited.

We perceive no abuse of that discretion in the present instance, and the order should be affirmed.

We concur: Belcher, C. C.; Hayne, C.

By the COURT.—For the reasons given in the foregoing opinion the order is affirmed.

GOODWIN v. BURNEY.

No. 12,091; August 18, 1887.

14 Pac. 676.

Ejectment—Conflict of Evidence—New Trial.—Where, in an action of ejectment, there is a decided conflict as to the facts going to show plaintiff's legal possession prior to defendant's entry, and as to the character of defendant's entry, an order refusing a new trial will be affirmed on appeal.

APPEAL from Superior Court, Plumas County; G. G. Clough, Judge.

J. D. Goodwin and D. W. Jenks for appellant; E. T. Hogan for respondent.

FOOTE, C.—This was an action of ejectment for a tract of land. As to the facts given in evidence going to show the plaintiff's legal possession of the premises in dispute, prior to the defendant's entry thereupon, and as to those relative to the character of the defendant's entry, whether or not it was in good faith, and under a claim of right adverse to that of the plaintiff, there is a decided conflict, for which reason the order refusing a new trial should be affirmed.

We concur: Belcher, C. C.; Hayne, C.

By the COURT.—For the reasons given in the foregoing opinion the order is affirmed.

HOGAN, Assignee, v. SANDERS.

No. 11,825; August 22, 1887.

14 Pac. 677.

Appeal—Order Granting New Trial—Insufficiency of Evidence. On an appeal from an order granting a new trial on the ground of insufficiency of the evidence to support the finding, where there is a conflict of evidence on material points, the order will not be set aside.

APPEAL from Superior Court, San Joaquin County; J. G. Swinnerton, Judge.

Louttit, Woods & Levinsky for appellant; J. C. Campbell (S. D. Woods and A. L. Levinsky, of counsel), for respondent.

McFARLAND, J.—This is an action by the assignee of Emma F. Sanders and W. W. Cowell, insolvents, to compel defendant to convey to plaintiffs certain lots of land, upon

the averment that they were conveyed to defendant by said Emma F. Sanders without consideration, and for the purpose of defrauding creditors, etc. Defendant claimed that he had furnished the purchase money to buy said lots; that the deed was made to said Emma (who was his daughter) to hold for him in trust, as she transacted most of his business for him; and that she afterward conveyed the lots to him at his request, because she was about to be married. The case was tried by the court without a jury, and judgment was rendered for the defendant. Afterward, however, on motion of plaintiff, a new trial was granted and defendant appealed from the order granting the new trial.

One of the grounds of the motion for a new trial was the insufficiency of the evidence to support the findings and decision. While we cannot see clearly why the learned judge of the court below granted the motion, still as there was a conflict of evidence on material points, we would not be justified in interfering with his discretion.

Order affirmed.

We concur: Sharpstein, J.; Thornton, J.

PEOPLE v. PARVIN and Others.*

No. 11,929; August 23, 1887.

14 Pac. 783.

Title of Statute—Amending Act.—Under constitution of California, section 24, article 4, providing that "Every act shall embrace but one subject, which subject shall be expressed in its title," the act of 1880, entitled "An act to amend section 3481 of the Political Code,"

*For subsequent opinion in bank, see 74 Cal. 549, 16 Pac. 490.

is constitutional, as a statute to be amended may be the "subject" of an amending act.[1]

Swamp Lands—Reclamation District—New District.—Political Code of California, section 3481, provides that the requisite number of owners of "lands within any reclamation or swamp land district, and in which the lands have not been reclaimed, may have said body of lands set off from such district." Held, that this did not repeal the prior laws, or affect the assessment proceedings thereunder, and applied to all future cases, whether the existing district was organized under the code or not.

APPEAL from Superior Court, Sacramento County; McFarland, Judge.

Action by the people, in the nature of a quo warranto, against the defendants, for claiming the so-called reclamation district No. 366 to be a legal district. The defendants, prior to the suit, had procured a district known as district No. 366 to be carved out of and set off from district No. 3, which latter was organized under the act of March 28, 1868. By the judgment of the court below, the defendants were ousted from the franchise of governing as a legal district the

[1] **Cited** with approval in Cook v. Marshall Co., 119 Iowa, 401, 104 Am. St. Rep. 283, 93 N. W. 378, where it is said: "If the title to the original act or acts is sufficient to embrace the matters covered by the provisions of the act amendatory thereof, it is unnecessary to inquire whether the title of the amendatory act would of itself be sufficient." The law was one to restrain by taxation the selling, etc., of cigarettes except in the original package.

Cited and approved in Bertram v. Commonwealth, 108 Va. 905, 62 S. E. 971, which holds that the constitutional objection goes properly to the original statute rather than the amendment. The reference there was to a law regulating druggists in respect of the sale of poisons.

Cited and followed in Binion v. Oklahoma Gas & Electric Co., 28 Okl. 358, 114 Pac. 1097, where the court calls attention to its having been followed in Morgan's Case, 98 Va. 812, 35 S. E. 448, and Bertram v. Commonwealth, 108 Va. 902, 62 S. E. 969, on the point that in amending and re-enacting or repealing any part of the code, or adding thereto, it is not necessary to do more than refer to the proper chapter and section, and adopt and express in the title the number and subject of such chapter, if the new provision is germane to the subject.

lands within its limits; the effect of the decision being to replace those lands under the jurisdiction of district No. 3. The contest in the trial court hinged on section 3481, Political Code, and upon its amendment as enacted April 15, 1880; that is, whether the defendants could avail themselves of that section of the Political Code so as to disestablish and dismember a district formed prior to the code, under a distinctive statute.

McKune & George for appellants; G. W. Gordon for respondents.

HAYNE, C.—The main question argued in this case, and the one upon which we think the decision must turn, is whether the act of 1880, entitled "An act to amend section 3481 of the Political Code," is in violation of section 24 of article 4 of the constitution, which provides that "Every act shall embrace but one subject, which subject shall be expressed in its title. . . . . " It is not contended that the act embraced more than one subject. The objection is that no subject is expressed; and the argument is that a section of the Political Code is not a subject, but is a mere reference to where the subject may be found.

The reason of the requirement that the subject shall be expressed is to prevent legislators being entrapped by false titles: Kurtz v. People, 33 Mich. 282; Boyd v. State, 53 Ala. 605; Hannibal v. Marion, 69 Mo. 575; Robinson v. Skipworth, 23 Ind. 317; Commissioners of Marion v. Commissioners of Harvey, 26 Kan. 197; Howell v. State, 71 Ga. 227, 51 Am. Rep. 259. This reason does not require the title to give the substance of the bill. To give the substance of the bill would be to make the title almost as cumbrous as the bill itself, which would tend to defeat rather than to accomplish the purpose of the requirement. It would be to make the title an index, abstract, or catalogue of the contents of the bill, which has been held to be unnecessary: Montclair v. Ramsdell, 107 U. S. 155, 27 L. Ed. 431, 2 Sup. Ct. Rep. 391; People v. Hazelwood, 116 Ill. 327, 6 N. E. 480; Hope v. Gainesville, 72 Ga. 250; Allegheny County Home's Appeal, 77 Pa. 80; Lockhart v. Troy, 48 Ala. 584; State v. Barrett, 27 Kan. 218; Brewster v. Syracuse, 19 N. Y. 117. Now, if the purpose was not to

apprise the legislators of the substance of the bill, it must have been to put them on inquiry as to what was sought to be done. And we think a title which shows that it is intended to change a specific section of a specified statute is sufficient to put the legislators on inquiry. This seems to us to be the reasonable construction. And it is generally agreed that the provision is to receive a liberal, and not a narrow and technical, construction; which latter would only serve to defeat and embarrass legislation: Stone v. Brown, 54 Tex. 342; Breen v. Railroad Co., 44 Tex. 305; State v. Ranson, 73 Mo. 86; In re Public Parks, 86 N. Y. 439, 440; Larned v. Tiernan, 110 Ill. 177; Mills v. Charleton, 29 Wis. 410, 9 Am. Rep. 578; McAunich v. Railroad Co., 20 Iowa, 342; Cooley Const. Lim., 146.

Nor does this construction do violence to the language of the provision. According to Webster, one of the meanings of the word "subject" is "that which is brought under thought or examination; that which is taken up for discussion." Now, is not the statute to be amended or repealed "that which is taken up for discussion"? When, for example, a scholar writes an essay upon some play of Shakespeare, suggesting an emendation of the text, is it not proper, and in accordance with usage, to say that the subject of the essay is the play in question, and not the plot, the scene, the characters, or the incidents of the play? If it be said that the statute to be amended is not the subject, such a rule would in some cases require an effect to be given to the provision beyond that which its language imports; for the provision does not require the title to express the subject of any previous act; it only requires an expression of the subject of the act to be passed. Now, in the case of a repealing act, what is the subject? It has no subject, unless the statute to be repealed is its subject, for it establishes nothing. So that, if the statute to be repealed is not a sufficient expression of its subject, it would be necessary to give the subject of the statute to be repealed, which would be going further than the language of the provision requires. Now, if the statute to be repealed is the subject of a repealing act, it would seem that the statute to be amended may be the subject of an amending act.

We think, therefore, that the construction which is suggested by reason of the provision does not do violence to its

language, but accords with it. And this result is in accordance with the preponderance of authority. Thus, in Fleischman v. Walker, 91 Ill. 320, the following title: "An act to amend an act entitled 'An act in regard to practice in courts of record' "—was held to be sufficient. Such a title is not substantially different from "An act to amend section —— of the Code of Civil Procedure"; and the case is authority for the sufficiency of the latter title. So in State v. McCracken, 42 Tex. 384, the following title: "An act to amend an act entitled 'An act to adopt and establish a Penal Code for the state of Texas,' approved August 26, 1871"—was held to be sufficient, although there was a mistake in giving the date of the passage of the code. So in Dunbar v. Frazer, 78 Ala. 538, the following title: "An act to amend section 1544 of the code except as to 'certain counties specified by name,' " was held to be sufficient. So in Dogge v. State, 17 Neb. 143, 22 N. W. 348, the following title: "An act to amend section 4 of chapter 55 of the Compiled Statutes of Nebraska" was held to be sufficient. Compare, also, State v. Garrett, 29 La. Ann. 638; Gatling v. Lane, 17 Neb. 84, 22 N. W. 453; John v. Reaser, 31 Kan. 406, 2 Pac. 771; Burroughs v. Commissioners of Norton, 29 Kan. 197, 198; Wheeler v. State, 23 Ga. 10.

These cases are authority for the proposition that the statute to be amended or repealed may be the "subject" of an amending act, and that is all that is necessary to the present decision. In some of them the reference to the act to be repealed seems too vague, and in that respect we think they go too far. While in some cases the act might be such that a reference to its title would be sufficient, yet if the statute is multifarious the precise part to be amended should be pointed out: Compare People v. Hills, 35 N. Y. 452. In other words, the reference should be specific.

The other questions raised do not require extended notice. If section 3481 is a valid enactment, we think, if clear, that it applies to all future cases in which the requisite number of owners of "lands within any reclamation or swamp land district, and in which the lands have not been reclaimed, desire to have said body of lands set off from such district," whether the existing district was organized under the code or not. This does not repeal the prior laws, or affect the assessment proceedings thereunder. It merely relates to the

creation of new districts of a certain character. The words "independent reclamation," in section 3481, seem to have no other meaning than "separate and distinct reclamation." This is apparent from section 3482, which provides for the liability of the new district for former work.

The foregoing being the only questions argued, and the findings setting forth all the facts, we think the case may be finally disposed of. We therefore advise that the judgment should be reversed, and the cause remanded, with directions to enter judgment in favor of the defendants.

We concur: Belcher, C. C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with directions to enter judgment in favor of defendants.

NEWMAN v. BANK OF CALIFORNIA and Another.

No. 12,088; August 30, 1887.

15 Pac. 43.

Appeal—Time for Filing Transcript.—The filing of a transcript on appeal, within forty days after the bill of exceptions is settled, is a sufficient compliance with rule 2, supreme court of California, requiring the transcript to be filed within forty days after appeal taken.

Motion to dismiss appeal on the ground that the transcript was not served and filed within forty days after the appeal was taken. It appeared from the clerk's certificate of proceedings in the lower court that the motion to set aside the judgment and grant a new trial was made and denied on February 11, 1887, and that the time to prepare a bill of exceptions was extended from time to time, and finally settled on April 22, 1887. The transcript was filed within forty days from that date. Rule 2 of the supreme court, upon which the motion was based, is as follows: "The appellant in a civil action shall, within forty days after the appeal is perfected,

and the bill of exceptions and the statement (if there be any) are settled, serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken."

By the COURT.—The motion to dismiss the appeal herein is denied. We do not see that the appellant is in any default for not having filed the transcript on appeal, the bill of exceptions not having been settled until the 22d of April, 1887: Rule 2 of this court. Motion denied.

SWAMP-LAND RECLAMATION DIST. NO. 407 v. WILCOX.

No. 11,782; August 31, 1887.

14 Pac. 843.

Swamp Lands—Assessments—Order of Board of Supervisors—Alteration—Evidence.—In an action by a swamp-land reclamation district to enforce the payment of a swamp-land assessment, plaintiff offered in evidence an order appearing in the "minute-book" of the board of supervisors, in which, by Political Code, sections 4029–4031, all orders of the board are required to be recorded; and it was conceded that, without the direction of the board, the order had been altered by B., who at the time of the entry, but not at the time of the alteration, was ex-officio clerk of the board. B. testified, against objection, that he made the alteration to correct what appeared to him, on examination, to be a clerical error of his deputy, now deceased, the then acting clerk of the board. The "rough minute-book," containing the original entry from which the record was made, and to which the altered record conformed, was also admitted against objection. Held, that it was error for the court to admit the order in evidence.

Swamp Lands — Assessment — Record — Alteration—Parol Evidence.—Held, further, that the order was a record which B. had no right to alter or amend, and that parol proof was inadmissible to correct or change the record.

Swamp Land—Assessment Lists—Description.—Under Political Code, section 3461, requiring certain assessment lists to contain "a description, by legal subdivisions, swamp-land surveys, or natural boundaries," a description, naming the adjoining proprietors on the respective boundaries, is sufficient.

Swamp Land — Assessments and Benefits — Duty of Commissioners.—Political Code, section 3456, provides that assessments for swamp-land improvements shall be proportionate to the resulting benefit, and section 3461 provides, among other requisites, that the list must contain "the amount of the charge assessed against each tract." The list in question conformed to the requirements of section 3461. Held, that the commissioners were not required to report that, in making the assessment, they had complied with section 3456, and that in the absence of evidence to the contrary, they must be presumed to have regularly performed their official duty.

Swamp Land—Assessment List.—In an Action to Enforce the Payment of a swamp-land assessment, it appeared that, in the assessment list, there was no dollar-mark before the figures opposite defendant's name, under the heading "Amount of charges assessed." In a number of assessments the dollar-mark preceded the figures under that heading, and in others the mark did not appear. Held, that the figures must be construed to represent dollars.

Swamp Land—Oath of Commissioners.—The Commissioners of Swamp-land Assessments were verbally sworn before viewing the land, but it did not appear that they subscribed their oath and filed it in the county clerk's office, as required of all "officers" by Political Code, sections 904, 909. Held, that whether the commissioners were or were not "officers," within the meaning of those sections, a failure of strict compliance with their requirements would not avoid official acts fully performed.

APPEAL from Superior Court, Sacramento County; T. B. McFarland, Judge.

W. H. Beatty, Add C. Hinkson and Freeman, Johnson & Bates for appellant; A. P. Catlin for respondent.

BELCHER, C. C.—This is an action to enforce payment of a swamp-land assessment. The plaintiff was organized as a swamp-land district in January, 1882, to reclaim certain swamp lands situate on Andrus island, in Sacramento county; and, as alleged in the complaint, the assessment sought to be recovered was thereafter regularly levied on land owned by the defendant within the district. In the court below judgment was entered in favor of the plaintiff, from which, and from an order denying a new trial, the defendant has appealed.

The validity of the assessment is assailed by the appellant upon several grounds, but they need not all be noticed.

In support of the averment that commissioners were appointed to view the lands of the district, and to assess upon them the proper charge for their reclamation, the plaintiff offered in evidence at the trial an order appearing in minute-book "K" of the records of the board of supervisors, which read as follows:

"Office of the Board of Supervisors,
"Friday, August 25, 1882.

"Swamp-land district No. 407. The report of the trustees of swamp-land district No. 407, was received and the following report adopted: 'Ordered that J. M. Upham, J. M. Stephenson, and John Miller, three competent and disinterested persons and residents of Sacramento county, be, and are hereby, appointed commissioners, who must, in the manner provided by law, view the land of said district and assess thereupon the proper assessment and charge for the reclamation of said land, to wit: The sum of $78,000, in the manner and at the cost surveyed, planned and estimated by J. C. Pierson, engineer of said district, and by the board of trustees filed this day with the clerk of this board.' "

The defendant objected to the entry being received in evidence upon the ground that when made it was an order appointing commissioners to view and assess a charge on lands in swamp-land district No. 341, and that it had since been altered and changed, and was therefore irrelevant and immaterial. And in this connection counsel offered to show that from August 25, 1882, until 1885, the record read as follows: "Swamp-land district No. 341. The report of the trustees of swamp-land district No. 341 was received and the following report adopted: 'Ordered that J. M. Upham, J. M. Stephenson and John Miller,' " etc. Then followed the balance of the order as above set out.

Thereupon the attorney for the plaintiff admitted in open court that on the seventeenth day of July, 1885, the day before the trial, Thomas H. Berkey, in his presence, changed the figures designating the number of the district from "341" to "407." It was then shown that Thomas H. Berkey was the county clerk of Sacramento county on the twenty-fifth day of August, 1882, but that his term of office had expired before he changed the record as above stated, and that he was then acting as a deputy county clerk; that the record of the pro-

ceedings of the board of supervisors, of which the entry in question was a part, was signed by the president of the board, but was not signed by Berkey or any of his deputies, and that the alteration was made by Berkey when the board of supervisors was not in session and without its direction or permission. Berkey was called as a witness and testified, against the objection of defendant, that he made the alteration as soon as his attention was called to what appeared to him, by a comparison of the records and examination of different pages of the record-book, to be a clerical error made by one Parnell, now deceased, who, in August, 1882, was his deputy, and as such was the acting clerk of the board of supervisors. A book was also introduced in evidence, against the objections of defendant, described by the witness, Berkey, as the book of original entry, and what he termed the "rough minutes"—a book in which the clerk first entered the minutes of the proceedings of the board, and from which the record of its proceedings was made up. In that rough minute-book appeared the following entry under date of August 25, 1882: "The board of swamp-land com., No. 407; report of trustees filed and ordered adopted; see order." Upon this showing the court overruled the objections of defendant, and admitted the order in evidence.

In so doing we think the court erred. The county clerk is ex-officio clerk of the board of supervisors, and as such must record all the proceedings of the board. And the board must cause to be kept a "minute-book," in which must be recorded all orders and decisions made by them, and the daily proceedings had at all regular and special meetings: Pol. Code, secs. 4029–4031. The order in question was, therefore, a record which, it is evident, Berkey had no right to alter or amend, even though he had personal knowledge—as he did not have in this case—that it was erroneously entered: Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589; Pacheco v. Beck, 52 Cal. 3; Wigginton v. Markley, 52 Cal. 411. Nor was parol proof admissible, in a collateral proceeding like this, to correct or change the record. This must be so on principle, and has been held in many similar cases. Thus, in Jordan v. School District, 38 Me. 170, it is said: "School districts are required by law to keep a record of their proceedings by a sworn clerk. Such proceedings can therefore be proved only by the record,

or a copy thereof, properly authenticated. The parol proof offered was consequently properly rejected." So in Morrison v. City of Lawrence, 98 Mass. 221, it is said: "Parol evidence was inadmissible to prove any acts or proceedings of the city council, or that the record of such proceedings as kept by the clerk was erroneous or defective": See, also, Mayhew v. District of Gay Head, 13 Allen (Mass.), 134, and City of Logansport v. Crockett, 64 Ind. 319.

If the record was, in fact, erroneous in the particulars named, the plaintiff's remedy was an application to the board of supervisors, or some other direct proceedings, to have it corrected.

The defendant also objected to the assessment list, offered in evidence by the plaintiff, upon several grounds, and his objections were overruled. One ground of objection was that the land was not properly described. The code required the list to contain "a description by legal subdivisions, swamp-land surveys, or natural boundaries of each tract assessed," and "the number of acres in each tract." The land assessed to the defendant was described as a portion of two swamp-land surveys, "bounded on the north by the lands of Mrs. R. F. Davis, on the east by the lands of L. C. Ruble, on the south by the lands of the Pacific Mutual Life Insurance Company, and on the west by Old river—number of acres, 100." This should be held, we think, to be a sufficient description, as otherwise it would seem impossible to describe the land so as to comply with the statute. Evidently, it could not have been described by legal subdivisions, nor, being a portion of two surveys, by swamp-land surveys. If, then, the words "natural boundaries" are to be construed as excluding all artificial boundaries, or boundaries made by man, it must follow that no sufficient description of the land could be made. We do not think such a result was intended or should be declared. In our opinion, any description which clearly identifies and marks out the land is sufficient.

Another ground of objection was that it did not appear from the face of the assessment list, or from any other evidence, that the assessment or charge was made in proportion to the whole expense, and to the benefits which would result from the works of reclamation, nor that the charge was estimated in gold and silver coin of the United States, nor in any kind of

money. Section 3456 of the Political Code requires the commissioners to "view and assess upon the lands situated within the district a charge proportionate to the whole expense, and to the benefits which will result from such works, and estimate it in gold and silver coin of the United States." And section 3461 provides what the list must contain as follows: "The list must contain: (1) A description by legal subdivisions, swamp-land surveys, or natural boundaries of each tract assessed. (2) The number of acres in each tract. (3) The names of the owners of each tract, if known; and if unknown, that fact. (4) The amount of the charge assessed against each tract."

The list returned was signed by the supposed commissioners, and complied with the requirements of section 3461, and there is nothing to show that the assessment was not made in full compliance with section 3456. The commissioners were not required to report that in making the assessment they had complied with the requirements of section 3456, and, if they had done so, their certificate to that effect would not have been even prima facie evidence of the fact: People v. Hagar, 49 Cal. 232. They were, however, charged with an official duty, and, in the absence of all evidence to the contrary, must be presumed to have regularly performed that duty: Code Civ. Proc., sec. 1963, subd. 15. It is true that there was no dollar-mark before the figures "4,746.45," placed opposite the name of defendant, under the heading, "Amount of charges assessed"; but the record shows that this was only one of a number of assessments contained in the list and that "in a number of cases there was a dollar-mark ($) preceding the figures in columns headed with the words 'Amount of charges assessed,' and in a number of other instances, as in this, the dollar-mark did not appear." It is not shown when or in how many places the dollar-mark did appear, but if it was prefixed to some of the items in the column, then all the figures standing in the same column, and in the same relation to other similar items, must be construed to be dollars, without a repetition of the mark before each item: People v. Empire G. & S. M. Co., 33 Cal. 171.

Still another ground of objection was that it did not appear that Upham, Stephenson and Miller took, subscribed and filed their oath of office in the office of the county clerk, before they assessed the land and made the assessment list. It did appear

that they were sworn verbally by a justice of the peace before they went out to view the land. It is not necessary to decide whether or not they were such officers as sections 904 and 909 of the Political Code refer to; for, if they were, their official acts, after being fully performed, were not rendered void by the fact that they had failed to comply strictly with the requirements of those sections.

After carefully examining the whole record, we find no error of which the defendant can complain, save the one first above noted; but for that error the judgment and order should be reversed and the cause remanded for a new trial.

We concur: Foote, C.; Hayne, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded for a new trial.

WHYLER and Another v. VAN TIGER.

No. 11,931; August 31, 1887.

14 Pac. 846.

Guardian—Execution of Lease Before Receiving Letters.—Where a mother was appointed guardian of the person and estate of her minor son, and on the same day presented her bond, which was approved, a lease made by her of the ward's property on the following day was held valid, though no letters of guardianship had been issued to her, and she had not taken the oath of office.[1]

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[1] **Cited** in Elizalde v. Elizalde, 137 Cal. 637, 70 Pac. 862, as a case going much further than necessary for disposing of the one under consideration, in which the complaint alleged that the person concerned had "duly qualified as guardian."

Cited in Dennis v. Bint, 122 Cal. 43, 68 Am. St. Rep. 17, 54 Pac. 380, where the court say the "case well illustrates the tendency of the law to discountenance the collateral impeachment of the authority of such officers." It goes on to say that in the case of an administrator who has sold land, the question to be considered is, Had the letters actually issued to him?

Guardian—Lease in Individual Name.—A lease purporting to be made by one tenant in common in her own right, and as the guardian of the estate of her cotenant and ward, is valid, although signed and delivered as her individual deed.

APPEAL from Superior Court, Sutter County; Phil. W. Keyser, Judge.

This action was brought by Joseph Martin Whyler to recover the possession of the undivided one-half of three hundred acres of land situated in Sutter county, California, for an accounting of the rents and profits, and for one hundred and fifty dollars damages for withholding possession. The land in controversy was leased to Henry Van Tiger by Mary E. Whyler, as guardian of the estate of Joseph Martin Whyler, but the lease was signed and delivered as her individual deed.

The cause was tried by the court, a jury being waived, and the court found from the evidence and admissions of counsel the following facts:

"(1) That the plaintiff is a minor, under the age of fourteen years, and now is, and more than two years last past has been, a resident of Sutter county, California, and has estate therein. (2) That on the twenty-eighth day of September, 1885, Mary E. Whyler, who was the mother of said minor, filed her petition with the clerk of this court, asking to be appointed the guardian of the person and estate of said minor, Jos. M. Whyler; and thereupon, by an order entered on its minutes and without notice, this court appointed her such guardian, and fixed her bond at one thousand dollars; and thereafter, to wit, on the twenty-ninth day of September, 1885, she presented her bond conditioned according to law, and the order of said court, which, on the same day, was duly approved by the judge thereof, and she immediately entered upon the discharge of her duties as such guardian. No letters of guardianship were issued to said Mary E. Whyler, nor did she take the oath of office. (3) That on the third day of May, 1886, John T. Allment and Mary E. Whyler filed their petition with the clerk of this court, asking that said John T. Allment be appointed guardian of the estate of the said minor, Joseph M. Whyler; and thereupon, by an order entered in its minutes, and without notice, this court appointed John T.

Allment guardian of the estate of said minor, and fixed his bond at five hundred dollars, and thereafter, to wit, on the fourth day of May, 1886, the said John T. Allment presented his bond, conditioned according to law, and the order of said court, which on the same day was duly approved by the judge thereof; that letters of guardianship were issued to said John T. Allment, and thereafter, to wit, on said last-mentioned day, the said John T. Allment took and subscribed the oath of office. (4) That said plaintiff and Mary E. Whyler were, on the twenty-eighth day of September, 1885, ever since have been, and now are, the owners in fee as tenants in common, in equal shares, of the land and premises described in plaintiff's complaint. (5) That on the thirtieth day of September, 1885, the said Mary E. Whyler, acting for herself, and also as guardian of the estate of said minor, Jos. M. Whyler, duly made, executed, and delivered to defendant a written lease of said premises for the period of four years from the date thereof; that on said last-mentioned day said defendant entered into the possession of said premises, and ever since has held, and now holds, the possession thereof, as the lessee thereof.

"(1) As conclusions of law, I find that Mary E. Whyler was the legal guardian of the person and estate of said minor, Jos. Martin Whyler, at the time she executed the lease to the defendant of the premises in controversy. (2) That she executed and was authorized to execute said lease, at the time it bears date, for herself and as such guardian, to said defendant, and that said lease conveyed to said defendant the right of possession of said premises. (3) That said defendant entered into possession of said premises under and by virtue of said lease, and is now and was on the fifteenth day of May, 1886, entitled to and is and was lawfully in the possession thereof. (4) That the defendant is entitled to judgment against the plaintiff for costs."

J. H. Craddock for appellant; Stabler & Bayne and Sanborn & Phipps for respondent.

By the COURT.—There is no error in the record. We think that Mrs. Whyler was a guardian when she executed the lease to defendant, and that the lease was properly executed.

The judgment must be affirmed. So ordered.

MERRICK v. SUPERIOR COURT FOR THE CITY AND COUNTY OF SAN FRANCISCO.

No. 12,311; September 7, 1887.

15 Pac. 47.

Writ of Review—Sufficiency of Petition.—In a petition for a writ of review, the petitioner alleged, as cause therefor, that the judge of the superior court had rendered judgment against him, when neither he nor his counsel was present, in excess of its jurisdiction, and contrary to the rule of court regarding the notice to be given when the court calendar will be taken up. Held, that the petition was insufficient.

Petition for writ of review. The petitioner, Merrick, claimed that in an action brought by one Stiles against him, commenced in a justice's court, and appealed to the superior court of San Francisco, the judge of the superior court rendered judgment against him without his counsel or himself being present in court, in excess of its jurisdiction, and contrary to a rule of said court regarding the giving of notice when the court calendar will be taken up, etc.

John J. Coffey for petitioner.

By the COURT.—The petition is insufficient, and the application for the writ of review must be denied. Ordered accordingly.

ROSS v. WILLIAMS.

No. 11,848; September 19, 1887.

15 Pac. 47.

Reformation of Deed—Mistake in Description.—A Settler on Public Lands gave a wrong description of the land in his application for a patent, owing to a mistake of the government surveyor in marking the stakes, and a patent for the land issued containing such wrong description. The property, after several conveyances, was conveyed to plaintiff, but the original patentee remained in possession

under an agreement with plaintiff by which he was to have the privilege to repurchase the land by a certain time. After the mistake in the description was discovered, plaintiff conveyed the land to the government, and received a patent in the name of the original patentee for the land as actually settled by the patentee. Held, that plaintiff was entitled to a reformation of the deeds from his grantor, and to the possession of the land taken in by the reformation.

APPEAL from Superior Court, Lassen County; M. Marsteller, Judge.

This is an action brought by A. E. Ross, plaintiff, against Joseph Williams, Michael Coffee, and D. M. Gloster, defendants, to reform certain conveyances, and to recover from defendant Williams the possession of the land put in by such reformation, with damages for its detention. The defendant Williams, as a pre-emptor, settled upon and improved "lots numbered 2, 3, and 4, and the S. W. ¼ of the S. E. ¼ of section 12, in township 24 N., of range 17 E., of Mount Diablo base and meridian, containing one hundred and forty-three 95-100 acres"; but in proceeding to obtain a patent therefor, and in issuing the patent therefor, the land was by mistake described as "lots numbered 2, 3, and 4, and the S. W. ¼ of the S. E. ¼ of section 13." He also, under the homestead laws, settled upon and improved the "N. W. ¼ of the S. E. ¼, and the W. ½ of the N. E. ¼ of section 12, and the S. W. ¼ of the S. E. ¼ of section 1"; but in his proceedings to obtain a patent therefor, and in issuing the patent, the tract was described by mistake as the "W. ½ of the N. E. ¼ of section 13, and the W. ½ of the S. E. ¼ of section 12."

The defendant Williams sold the land to the defendant Coffee, who sold to defendant Gloster, intending to convey the land actually settled on by Williams, but followed the description found in the patent from the United States.

In January, 1882, Williams being in possession of all the land under an agreement with Gloster, by which he had the right to purchase all of it from Gloster, but the time in which he was to make such purchase being about to expire, he requested plaintiff to buy the land, and thereafter give him (Williams) an extension of time, upon such terms as Williams and the plaintiff might agree, in which to purchase and pay for it. The plaintiff purchased all of the land from

Gloster, who on January 20, 1882, executed and delivered to plaintiff a warranty deed, by which he intended to convey to plaintiff the land which Williams had settled upon and improved, and which was intended to be conveyed to him by the government; but Gloster followed the description as made in the deed to him, as conveyed to Williams by the United States.

It appeared that in making the government survey the surveyors made a mistake in marking some of the stakes, which misled the defendant and others in describing the land in their applications, and the error thus made continued through all the writings. This mistake was discovered in 1882, and, the attention of the land department of the government being called to it, was corrected before this suit was commenced, as to patents, by plaintiff's deeding the property conveyed to him by Gloster to the United States, and receiving a patent in the name of Williams for the land settled on by Williams. Plaintiff bought the land from Gloster for thirteen hundred and nine dollars. He then gave to defendant, Williams, a contract of sale whereby he agreed to convey the land to defendant at any time within five years, upon payment of the purchase price above stated, interest, taxes, and other advances, such interest to be paid annually. This agreement was made the sixteenth day of February, 1882, and it provided that, if defendant failed in any part of his agreement, he would deliver possession of premises to plaintiff. Defendant failed to comply with the agreement as to payment of interest, and before commencement of this action he surrendered the agreement, and notified plaintiff that he could not comply with it. After it was learned that a mistake had been made in the description of land, defendant claimed that he was on public land, and refused to surrender possession to plaintiff. Plaintiff had judgment. Defendant, Williams, appeals.

E. V. Spencer for appellant; J. D. Goodwin for respondent.

FOOTE, C.—This is an action brought for the purpose of reforming certain conveyances, and to recover certain lands which should have been properly described, but which by mistake were erroneously set out, therein. The plaintiff had

judgment against all the parties defendant, but only one of them, Williams, appeals therefrom, and from an order denying him a new trial.

The points made by the appellant are that the findings are not supported by the evidence, and that the court erred in its rulings upon the admission and exclusion of evidence. To us the findings appear to be fully sustained by the evidence. We have examined with care the various rulings of the court as to the exclusion or admission of proffered evidence, and find that tribunal either to have been right in its action, or that its rulings did not and could not have had the least effect upon the decision in the cause. The effort of Williams to retain the land, and the money for which he had sold it, and his refusal to convey it by the description which it was originally intended to have, appears to have been inspired by a supposition he seems to have entertained that in some way unexplained by the record he could keep the plaintiff out of his just rights.

There is no merit in the appeal, and the judgment and order should be affirmed.

We concur: Belcher, C. C.; Hayne, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

In re KNAPP.

No. 12,050; September 21, 1887.

16 Pac. 520.

Attorney—Disbarment.—Charges Against an Attorney for the purpose of disbarring him held not sustained by the evidence.

Proceedings for the disbarment of E. G. Knapp, attorney at law.

Complainants, who were the debtors of a client of respondent on a judgment confessed by them April 6, 1886, in about ten thousand dollars, charged respondent as follows: (1)

With having, through the agency of his client, the complainants' creditor, induced them to confess this judgment by promising to stay execution thereon for one year, and with having violated this promise by issuing and levying execution on said judgment, thereby defrauding them; (2) with having misled the superior court of Stanislaus county by a false statement of fact regarding the evidence of one Joseph Lord, a witness in a case brought by complainants to stay this execution; (3) with having, by an artifice, secured the deposition of one T. Vinzent before a notary in the city and county of San Francisco, without proper notice, and by an improper use of the notary's subpœna; (4) with having induced one E. Donovan to make an affidavit contrary to the fact. The petition was verified by the five complainants. Respondent denied the truth of the allegations of the petition. The evidence was taken orally before the court in bank on May — and May ——, 1887.

D. S. Terry and W. E. Turner for complainants; Warren Olney for respondent.

Per CURIAM.—This is a proceeding under chapter 1, title 5, Code of Civil Proceedure, for the removal of respondent as an attorney and counselor. We think the evidence insufficient to sustain any of the charges preferred against him. Therefore the proceeding is dismissed.

BULL v. COE, Administrator, and Others.*

No. 12,055; September 30, 1887.

15 Pac. 123.

Homestead — Mortgage — Foreclosure — Presentment of Claim Against Decedent.—Under Code of Civil Procedure, section 1475, providing that claims secured by liens or encumbrances "on the homestead" must be presented and allowed as other claims against the estate, a deed absolute, intended as a mortgage, executed by a husband and wife upon the wife's separate property, which had been

*For subsequent opinion on appeal, see 77 Cal. 54, 18 Pac. 808.

declared a homestead, to secure the debt of the husband, cannot be foreclosed after the death of the husband, no claim having been presented against the estate.

Homestead — Foreclosure of Mortgage — Estate of Decedent.— The provision of Code of Civil Procedure, section 1500, that an action may be brought to enforce a mortgage or lien against the property of a deceased person where all recourse against any other property of the estate is expressly waived in the complaint, has no application to a mortgage upon a homestead, whether a probate homestead or one selected and recorded before the death of decedent.

Homestead—Mortgage—Failure to Present Claim to Administrator.—Where the homestead, upon which the foreclosure of a mortgage is sought after the death of one of the mortgagors, has been released from the lien of the mortgage by the failure of the mortgagee to present his claim against the estate within the time limited for that purpose, the foreclosure proceedings cannot be sustained on the ground of an abandonment by the attempt of the survivor to get a homestead on other property after the expiration of the time for the presentation of claims.

Homestead.—By Civil Code, Section 1243, a Homestead can be Abandoned only by a declaration of abandonment or a grant thereof; and the execution of a deed of the homestead absolute in form, but intended as a mortgage, is not an abandonment.

Homestead—Enforcement of Mortgage for Excess.—Where a homestead has been released from the lien of a mortgage by the failure of the mortgagee to present his claim against the estate of one of the deceased mortgagors, if the right to enforce it as to any excess above five thousand dollars remains, the burden of proof is upon the mortgagee to show the existence of such excess.

APPEAL from Superior Court, Los Angeles County; A. Brunson, Judge.

Wells, Vandyke & Lee for appellant; Bicknell & White and Chapman & Hendrick for respondent.

HAYNE, C.—The defendant, Hattie W. Strong, and her husband, by a deed absolute in form, mortgaged to the plaintiff the wife's separate property, upon which a homestead had been declared, to secure a debt of the husband. The husband died and the defendant Coe was appointed administrator of his estate, and as such gave notice to the creditors to present their claims. The plaintiff did not present any claim, but commenced an action to foreclose the mortgage, under section 1500 of the Code of Civil Procedure, stating in his complaint

that he waived all recourse against the other property of the estate. The court below gave judgment for the defendants and the plaintiff appeals.

In the case of Camp v. Grider, 62 Cal. 21, it was held that section 1500 applies only to "mortgages and liens other than liens and encumbrances on the homestead," and that claims secured by liens and encumbrances on the homestead are required to be presented under section 1475. We see no ground for saying that the rule applies only to probate homesteads. Section 1475 expressly mentions "the homestead selected and recorded prior to the death of the decedent"; and it was this "homestead" which the section refers to when it says that, "if there be subsisting liens or encumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate." To say otherwise would be to make the necessity for the presentation of claims secured by liens upon the homestead dependent upon the intention of the survivor to apply or not to apply to have the property set off as a probate homestead. In view of the fact that there is no time limited for the making of such an application, this test would be too uncertain; and it cannot be supposed that the legislature intended it. Such a test would enable the survivor to lull the creditor into the belief that the application was not going to be made, and, after the time for the presentation of claims had expired, to cut him out by having the property set off as a probate homestead. We think, therefore, that the rule of Camp v. Grider is not to be limited to cases where application is made to have the property set off as a probate homestead.

Nor does it make any difference that the property upon which the homestead was declared was the separate property of the wife. The debt was the debt of the husband, and the claim for it was against his estate. The language of section 1475 is general, and contains no limitation dependent upon the ownership of the property upon which the homestead was declared. It may well be that, in the opinion of the legislature, it was necessary for the probate court to have before it all the facts as to homestead, so as to enable it to act intelligently upon an application to set off a probate homestead or in applying the funds of the estate in paying off particular liens. At any rate, the requirement of the statute is general,

and we do not think the court is warranted in limiting it. The failure to present the claim, therefore, released the homestead from the lien of the mortgage. It is not necessary to consider whether the mortgage can be enforced as to any excess which there may be over the sum of five thousand dollars, for it does not appear that there was any such excess in this case. And, if we assume that the mortgage could still be enforced as to that, we think it incumbent upon the party whose right to recover depends upon the existence of such excess to show that it in fact exists.

The appellant contends that the parties did not reside upon the property at the time the homestead was declared. But the court finds the fact in favor of the respondent; and, while the testimony of the witness Russell is subject to some criticism for ambiguity, we cannot say that the finding is unsupported by the evidence. It is also contended that the homestead was abandoned by the attempt of the survivor to get a homestead on other property. But, in the first place, this attempt was not made until the expiration of the time for the presentation of claims; and in the second place, a homestead in this state can be abandoned only in the manner specified in section 1243 of the Civil Code. There is no pretense that the acts mentioned in that section were done. The deed to the plaintiff, though absolute in form, was a mortgage, and hence did not operate as an abandonment: Mabury v. Ruiz, 58 Cal. 15; Porter v. Chapman, 65 Cal. 365, 4 Pac. 237.

We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: Belcher, C. C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

In re Petition of MARSHALL.

November 8, 1887.

15 Pac. 772.

Certiorari.—In a Suit to Condemn Land the Plaintiff Obtained, in March, 1887, leave to amend complaint and summons filed December, 1886, by inserting the name of the petitioner herein as defendant, and in April, 1887, having consolidated with other railroad companies, obtained an order to substitute the consolidated company as plaintiff. Petitioner applied for a writ of certiorari. Held, that it must be denied.

Certiorari to Superior Court of San Diego County; J. D. Works, Judge.

J. H. Marshall petitioned for a writ of certiorari to the superior court of San Diego county. His name appeared in the body of a complaint in a condemnation suit, but not in the summons nor as defendant in the complaint filed December, 1886. Plaintiff, in the condemnation proceedings in March, 1887, obtained leave to amend the summons nunc pro tunc by inserting petitioner's name as defendant, and later the complaint was so amended, and in August, 1887, the complaint was amended by substituting a company as plaintiff.

J. G. Deakin (Myrick & Deering, of counsel) for petitioner; Lewis Chase, contra.

By the COURT.—In the above-entitled cause the application for a writ of review is denied.

PEOPLE v. CITY AND COUNTY OF SAN FRANCISCO.*

No. 11,456; November 30, 1887.

15 Pac. 747.

Public Lands — Decree and Patent — Boundaries — Conflicting Titles.—A decree of the United States circuit court, confirming a Mexican grant of lands, described them as a tract lying above high-water mark, bounded on three sides by the sea, and on the other by a direct line to be so run as to include the required quantity. The patent, issued by virtue of the authority of the decree and in pursuance thereof, granted a tract of land described by courses and distances which, if followed, would include a large tract lying below high-water mark, to which the state claimed title by virtue of act of Congress of September 28, 1850. Held, in an action by the state to quiet its title, that the patent was not conclusive, but that the decree, by virtue of which it was issued, was entitled to be read in connection therewith in determining what lands were conveyed, and that the natural boundaries called for in the decree would overrule the courses and distances of the patent.

Public Lands—Action to Quiet Title—Pleading.—In an action to determine an adverse claim to certain lands wherein the state was plaintiff, the complaint alleged that the lands were below high-water mark, and consequently belonged to the plaintiff as swamp lands, by virtue of act of Congress of September 28, 1850; that the defendant, as successor in interest to a Mexican citizen, obtained a decree from the United States circuit court, confirming its title to a tract of land described as included between certain boundaries, and as lying above high-water mark. The patent, issued by virtue of this decree, described a tract of land by courses and distances which, if followed, would include the lands in dispute. Held, that the complaint stated a good cause of action, in that if the allegations were true the plaintiff would be entitled to a decree, and a demurrer thereto should be overruled.

APPEAL from Superior Court, City and County of San Francisco; J. F. Sullivan, Judge.

Phillip G. Galpin and E. C. Marshall, attorney general, for appellant; John Lord Love, city and county attorney, and Garber, Thornton & Bishop for respondents.

*For subsequent opinion in bank, see 75 Cal. 388, 17 Pac. 522.

PATERSON, J.—This is an action to determine an adverse claim to one hundred and fifty acres of land, more or less, situated at the northern extremity of the peninsula of San Francisco, and the appeal is from a judgment rendered in favor of the defendant on demurrer to the complaint.

It is alleged in the complaint that the premises in dispute were below ordinary high-water mark at the date of the purchase from Mexico, and ever since have been; that on September 28, 1850, the Congress of the United States passed an act granting to the state the swamp lands within her limits; that the lands in dispute were and are swamp lands, and that the title thereto is in the state; that by the treaty of Guadalupe Hidalgo and the act of March 3, 1851, the United States guaranteed the protection of the property of all Mexican citizens within the state at the date of the conquest; that under said act of March 3, 1851, the city of San Francisco, claiming to be successor in interest of the pueblo of San Francisco, a Mexican citizen, filed a petition before the board of commissioners established by the act for a determination of its claim to four leagues of land on the peninsula of San Francisco; that the board, after due proof, made a decree in the premises; that the cause was afterward appealed to the United States district court for the northern district of California, and was thence transferred to the circuit court of the United States for the circuit of California under a special act of Congress of July 1, 1864; that the circuit court made a final decree adjudicating the case as between the United States and the city of San Francisco, and confirming the claim of the city to the lands therein described, which decree is recited in the amended complaint, and describes the premises confirmed as a "tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark (as the same existed at the date of the conquest of the country, namely, the seventh day of July, 1846) on which the city of San Francisco is situated, as will contain an area of four square leagues, said tract being bounded on the north and east by the bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area aforesaid, subject to the following deductions," etc. It is then alleged

that the premises in question are not within these boundaries, and that under the laws of Mexico the pueblo could not and did not own land below ordinary high-water mark, nor said premises.

The complaint further avers that, for the purpose of carrying out the decree, a survey was made and approved by the United States surveyor general in 1867–68, of which notice was duly given and advertised as required by statute; that objections were made to the survey by parties interested in lands embraced therein, and affidavits and proofs were taken in support of the survey; that the surveyor general forwarded to the commissioner of the general land office a copy of the survey and objections and proofs, with his opinion thereon; that after a full hearing of the parties interested, the commissioner, in November, 1878, decided in favor of the survey, but allowing an appeal to the Secretary of the Interior; that no appeal was taken by the city, but the military authorities appealed from that part of the decision which related to the Presidio Reservation, within which the premises in dispute were not included; that on the appeal the secretary reversed the commissioner's decision, disapproved the survey, and ordered a new survey, and transmitted his decision, directions, and instructions to the commissioner; that a new survey and plat were therefore ordered by the commissioner, and in December, 1883, a new survey and plat were made by the surveyor general, which included the premises in controversy; that the surveyor general indorsed on the new survey his certificate that the same was made in accordance with the instructions of the commissioner, and then, having signed and sealed the same with his official seal, returned it and the field-notes of the survey to the commissioner of the general land office; "that thereafter a patent in due form of law, based upon the said last-mentioned plat and survey, was issued under the great seal of the United States, and signed by the president thereof, which purported, by virtue of the authority of said decree, and in pursuance thereof, to grant and convey to the city of San Francisco" the land embraced in said last-mentioned survey, and including the premises in controversy. The complaint then alleges the consolidation of the city and county, and its succession to all the rights, title, and interest of the city under the decree, survey, and patent; that under

the patent and otherwise the defendant claims an interest in the premises, and that the patent is a cloud on plaintiff's title. The premises are then described by courses and distances referring to "Alardt and Minto's survey of the pueblo of San Francisco, filed in the office of the surveyor general of the United States, in the city of San Francisco, June 23, 1882."

The only question is, Does the complaint state facts sufficient to constitute a cause of action? Upon her admission into the Union, the state of California became the owner by virtue of her sovereignty of all tide-water lands within her borders, lying below high-water mark, except such as had been disposed of by the Mexican government prior to the treaty of Guadalupe Hidalgo. The territory acquired from Mexico was by the express terms of that treaty taken by the United States subject to the trust of protecting all legal and equitable interests of prior grantees under the former sovereign. The state could not take more than the United States received. Necessarily, therefore, the claim of the state by virtue of her admission and her sovereignty was subordinate to such prior equities, and subject to the power of the federal government to confirm prior Mexican grants, and to locate grants of specific quantities of land within the extreme boundaries of larger tracts: Teschemaker v. Thompson, 18 Cal. 11, 79 Am. Dec. 151; Lux v. Haggin, 69 Cal. 255, 4 Pac. 619, 10 Pac. 674; Le Roy v. Dunkerly, 54 Cal. 452.

There is a distinction between the case of Goodtitle v. Kibbe, 9 How. (U. S.) 471, 13 L. Ed. 220, and cases like the one at bar, which is clearly shown and explained by Chief Justice Field in Teschemaker v. Thompson, supra.

The United States government has exercised the power vested in it, and has, through its courts, and the officers of its land department, attempted to define the boundaries of the four leagues of land to which the city of San Francisco, as successor in interest of the pueblo of San Francisco, a Mexican citizen, was entitled. The court, having jurisdiction to hear and determine the right of this claimant, finally confirmed its claim to four square leagues of land in the extreme end of the peninsula, giving as the boundaries thereof on the west, the north, and the east the natural lines of high-water mark, leaving the southern boundary to be fixed by the surveyor on such

a line as would include between it and the high-water lines north of it said four square leagues of land. This, it seems, the surveyor did not do; but ignoring the natural boundaries, fixed by the court in its decree for the west, north, and east, ran his lines into the sea below high-water mark, and included within his description of the tract by metes and bounds about one hundred and fifty acres of land belonging to the state. Following the survey, the patent describes the land by metes and bounds, and the only questions to be considered—if it be true that the United States has the power which we have said it possesses—are, Can the decree be read in connection with the patent? And which shall control, the boundaries given in the decree, or those given in the patent?

It is claimed by respondent that the patent is conclusive against the state as to location and boundaries of the pueblo grant, and it must be conclusively presumed in this action that the description by metes and bounds conforms to the decree. We do not think that this contention can be maintained in reason or upon authority. In the cases cited there was no variance between the decree of confirmation and the patent. In Teschemaker v. Thompson, supra, the grant was assumed to be one of quantity only. The grant was confirmed by the court; and its boundaries as defined in the decree were followed in the patent, which was issued in November, 1857, at which time the federal courts controlled the surveys, and were empowered and expected to make them conform to the decree. The provisions of the act of March 3, 1851, had been regularly followed by the tribunals appointed to determine the claim and to fix the boundaries of the land. There was no variance or conflict between the decree and the patent as to description, and the court there held that the power of the government to determine the question as to the validity of the claim, and the extent and boundaries of the land having been regularly pursued, the patent was conclusive, although it appeared that it in fact included lands lying below high-water mark. The defense in that case was that the land belonged to the state of California absolutely, by virtue of its sovereignty, and that the government of the United States could not by any proceeding had under the act of March 3, 1851, deprive the state of its title thereto.

Ward v. Mulford, 32 Cal. 365, was in all respects like Teschemaker v. Thompson, supra.

Many of the cases cited relate to grants with no specific boundaries whatever. In none of the cases cited by respondent is the question of the power of the officer to issue a patent for land not embraced in the decree considered. That question is important here, because the land in controversy, unlike the public domain of the United States, was not within the jurisdiction of the land department of the government, unless placed there by the decree of confirmation, and because the only unknown or undetermined line is that which bounds the tract on the south side. Upon all other sides, the high-water mark is the monument between the land of the city and that of the state. The sea is a fixed boundary.

As stated before, the government of the United States is in duty bound to carry into effect the stipulations contained in the treaty of Guadalupe Hidalgo; but the power to do so must be exercised in the manner provided by Congress, and it would seem that when Congress vested in the federal courts the power to determine the rights of Mexican claimants, and provided (section 7) that in making the survey the surveyor general should "follow the decree of confirmation as closely as practicable, whenever such decree designates the specific boundaries," and that "it shall be the duty of the commissioner of the general land office to require a substantial compliance with the directions of this section before approving any survey and plat forwarded to him," that the officers of the land department are as to such lands merely auxiliary to the court, with special and limited jurisdiction to carry out its decrees. Such seem to have been the views of this court as expressed in More v. Massini, 37 Cal. 432, where the patent granted certain lands described by metes and bounds (following the survey), but the court said: "The land confirmed is bounded on the south by the seashore, and the land included in the survey will also be held to be bounded on the south by the seashore, unless the calls imperatively demand other boundaries. When the decree of confirmation fixes the exterior bounds of a rancho, whether it is one granted with specific boundaries, or one of a specific quantity within a larger area, the presumption is that the lines of the survey

coincide with, or at least do not extend beyond, the exterior limits or bounds of the decree; for the survey is not an independent act, but is an act performed under the decree, and preparatory to its being carried into effect by a patent. . . . . It appears by the plat that, following the courses and distances of the survey, portions of the sea will be included in the lines of the rancho. This is inconsistent with the calls of the decree of confirmation, which confirms a tract bounded by the seashore."

In that case the patent did not show upon its face that any land below high-water mark was included in the tract granted, but the fact was shown at the trial by witnesses—surveyors. It is true the patent recited the description of the tract as confirmed by the decree, but the land described in the patent was the tract as surveyed, giving the metes and bounds. The recital in the patent referred to in the complaint herein is sufficient, we think, to connect the decree with the patent as part of the chain of title. Recitals of this character show, and are intended to show, why the patent was issued. They preserve—like recitals in deeds between individuals—the connection in the chain of title; are binding upon the grantee; and the muniments of title referred to become links on which the strength of the title may be tested. Where the deed recites the record of the authority upon which it is made, the record referred to becomes a part of the deed, and the grantee takes notice of its limitations: Cleveland v. Hallett, 6 Cush. (Mass.) 404; Devlin on Deeds, secs. 1000, 1003.

Upon the allegations of the complaint, and the authority of More v. Massini, supra, we think that the plaintiff would be entitled to read the decree in connection with the patent, and if the facts stated be found to be true, would be entitled to a decree quieting title to the lands in controversy. In case of a conflict, courses and distances must yield to monuments. Where watercourses, or mountains, or any other natural objects, are called for in patents, distances must be lengthened or shortened, and courses varied so as to conform to those objects. Mistakes in distances and courses are more probable and more frequent than mistakes as to trees, rivers, mountains, and other objects capable of being clearly and accurately fixed: McIver v. Walker, 9 Cranch (U. S.), 177, 3 L. ed. 694.

Judgment reversed, with directions to overrule the demurrer and allow the defendant to answer.

We concur: Searls, C. J.; Thornton, J.; McKinstry, J.; Sharpstein, J.; McFarland, J.; Temple, J.

MALONEY and Another v. HEFER.

No. 9,866; November 30, 1887.

15 Pac. 763.

Homestead—Residence at Time of Filing Declaration.—A married woman owned two houses and a lot, and, while residing in one of the houses, prepared a declaration of homestead, and went into another county to visit for four months. Her husband, during her absence, occupied lodgings in a house not on the property. While she was away, the declaration of homestead was filed. Defendant obtained judgment against the plaintiffs, and levied on a portion of the lot, and sold it. Held, in an action by the husband and wife to quiet their title to the lot, that, as the claimants were not residing on the lot when the declaration was filed, it was not valid.[1]

APPEAL from Superior Court, San Francisco County; John F. Finn, Judge.

E. J. & J. H. Moore (Nathaniel Bennett of counsel) for appellants; N. B. Mulville for respondent.

BELCHER, C. C.—The plaintiffs were husband and wife, and brought this action to quiet their title to a lot of land in the city of San Francisco. The lot fronts on Perry street, having a width of twenty-five feet and a depth of eighty feet, and is claimed by the plaintiffs as their homestead.

In January and February, 1883, there were two houses on the lot, one on the front and the other on the rear part of it, and the value of the whole property was between two thou-

[1] Cited in Estate of Green, 1 Cof. Pro. Dec. 450, 452, referring to a "statutory homestead," under section 1262 et seq. of the Civil Code, as distinguished from a "probate homestead," under section 1465 of the Code of Civil Procedure.

sand five hundred and three thousand dollars. The front house had a basement, and above it two flats or stories, which were leased to and occupied by tenants. The rear house was a small one and was reached by a narrow passageway along the side of the front house from Perry street. Between the street and the front house was a yard sixteen and one-half feet long and five feet wide, and between the two houses was a yard which was divided by a board fence from five to seven feet high. Mrs. Maloney owned the whole lot as her separate property, and had resided with her husband in the rear house for more than ten years. On the twenty-fifth day of January, 1883, while so residing on a part of the premises, she executed and acknowledged, in proper form, a declaration of homestead on the whole lot, and on the eighth day of February following filed it for record. After executing the declaration, and on the same day, she temporarily went away to visit friends in another county, and was gone about four months. During her absence her husband occupied other lodgings in the city, and the house, with the exception of one bedroom, which with its furniture was reserved, was occupied by a tenant. On or about the first day of March, 1883, the defendant obtained a judgment against the plaintiffs, and subsequently, under an execution issued thereon, sold, bid in, and in due time obtained a sheriff's deed for a part of the lot described as twenty-two feet wide on Perry street, and extending back fifty-five feet.

At the trial it was claimed by the plaintiffs that the quality of a homestead was impressed upon the whole lot, and so no part of it was subject to sale under execution. The court thought otherwise, and adjudged that the defendant had acquired a good title to that part of the lot on which the front house stood, and the yards which were attached to it in front and rear. The plaintiffs moved for a new trial, and the case comes here on appeal from the judgment and an order denying their motion.

It has been frequently decided by this court that to constitute a valid homestead the claimant must actually reside on the premises when the declaration is filed: Babcock v. Gibbs, 52 Cal. 629; Dorn v. Howe, 52 Cal. 630; Aucker v. McCoy, 56 Cal. 524; Pfister v. Dascey, 68 Cal. 572, 10 Pac. 117. Here the homestead claimants were not actually residing on

the premises when the declaration was filed. Nearly two weeks before it was filed they went away and ceased to occupy any part of the premises. It is true, they went away temporarily, and were gone only about four months; but during that time they certainly did not actually reside on any part of the lot filed upon.

It follows that the judgment and order should be affirmed.

We concur: Foote, C.; Hayne, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

PEOPLE v. KELLEHER.

No. 20,328; December 1, 1887.

16 Pac. 705.

Criminal Law—New Trial—Newly Discovered Evidence.—Defendant, being convicted of an offense, filed, in a motion for a new trial, the affidavits of himself and two others to the effect that he was in a certain saloon when the alleged offense was committed, that another person had admitted that he did the act, and that defendant did not know of such evidence until after the trial. Held, that a new trial was improperly refused.

APPEAL from Superior Court, Contra Costa County; Joseph P. Jones, Judge.

This was an information against Cornelius Kelleher for an assault with intent to commit rape on the person of Kate Halpin. Defendant was convicted, and moved for a new trial, on the ground of after-discovered evidence; and in support thereof filed the affidavits of himself and two others alleging that defendant was in the saloon of John Lyons, waiting upon customers, when the alleged offense was committed; that one Lucey had admitted that he had taken hold of the woman at the time alleged in the information, and that she screamed, whereupon he ran away; and that defendant

was not aware of the existence of such evidence until after the trial. The motion was overruled, and defendant appeals.

E. R. Chase and T. R. Whitcomb for appellant; George A. Johnson, attorney general, for the people.

Per CURIAM.—As stated by the attorney general upon the argument, the evidence upon which a conviction was had in this case is very weak, although there is sufficient to prevent this court from setting aside the verdict. In view of the testimony in the case, however, we think that the affidavits filed in support of the motion for a new trial on the ground of newly discovered evidence were sufficient to entitle the defendant to a new trial. Judgment reversed and cause remanded for a new trial.

Ex Parte HUTCHINGS.

No. 20,368; December 15, 1887.

16 Pac. 234.

Indecent Exposure — Indictment — Description of Offense.—A complaint under Penal Code of California, section 311, which declares it an offense to "willfully and lewdly procure, counsel, or assist" anyone to make an indecent exposure of the person, charged that defendant "willfully, unlawfully, and lewdly solicited" an indecent exposure. Held, that a conviction on such complaint will be sustained, on an application for discharge on habeas corpus.

Application for writ of habeas corpus.

This is a proceeding against one Ollie Hutchings for a misdemeanor. The complaint was drawn under Penal Code of California, section 311, declaring that "any person who willfully and lewdly procures, counsels, or assists any person to expose himself" indecently shall be guilty of a misdemeanor, and charges that the defendant "did willfully, unlawfully, and lewdly solicit . . . . a female to expose herself . . . . in such a manner as is offensive to decency." The defend-

ant was convicted of the offense charged in the complaint, and she applies to this court for discharge upon a writ of habeas corpus.

G. H. Perry for petitioner; J. V. Coffey, prosecuting attorney, for the people.

Per CURIAM.—The application of Ollie Hutchings to be discharged from custody on a writ of habeas corpus having been heretofore argued, submitted, and taken under advisement by the court, and now, at this day, the court being advised in the premises, it is ordered and adjudged that the application of petitioner be, and the same is hereby, denied, and that she be remanded.

CARR v. QUIGLEY.*

No. 9531; December 19, 1887.

16 Pac. 9.

Appeal—Questions Decided on Former Appeal.—The result of a former appeal in a suit involving the title to land claimed through a United States patent to a railroad company, where the judgment was reversed because the court below rejected evidence to the effect that, at the time the grant from Congress to the railroad company took effect, the land was within the limits of a Mexican grant then sub judice, is that if, at the time, the land was within the limits of a Mexican grant then sub judice, the patent was void, and could be attacked collaterally, and the decision, never having been appealed from, is not now subject to review.

Public Lands—Patents—Grant Sub Judice.—The Mexican Government granted a certain described tract of land, known as "Las Pocitas," in 1839, which afterward became a part of the state of California, "containing in all two square leagues." A survey of it was made by the surveyor general, which showed that ten leagues were included within the description. This survey was set aside by the Secretary of the Interior, on the ground that it contained more land than was called for in the grant, and a new survey was made, and approved by the Secretary of the Interior in 1871, and a patent

*For subsequent opinion in bank, see 79 Cal. 130, 21 Pac. 607.

for the two leagues issued upon this last survey in 1872. Held, that the grant was sub judice until the final survey was approved by the Secretary of the Interior, and a title to land contained within the exterior limits of the Mexican grant, claimed through a United States patent to a railroad company in 1862, was void.

Public Lands—Conflicting Titles—Opinion of Commissioner.—The Mexican Government granted a certain described tract of land, which afterward became a part of the state of California, "containing in all two leagues," and it actually contained ten leagues. The survey of the two leagues was made, and approved by the Secretary of the Interior in 1871, and a patent issued in 1872. Upon an action in ejectment by a person who claimed title to land within the limits of the grant, through a patent from Congress to a railroad company in 1862, held, that the defendant was not affected by opinions of the commissioner and the Secretary of the Interior, in proceedings in the land office to which he was not a party, to the effect that a preliminary survey made in 1854, but never approved by the Secretary of the Interior, established the exterior limits of the Mexican grant.

APPEAL from Superior Court, Alameda County; A. M. Crane, Judge.

Shafter, Parker & Waterman for appellant; Mich. Mullany for respondent.

HAYNE, C.—Ejectment. The plaintiff claims through a United States patent issued to the Central Pacific Railroad Company, as successor in interest of the Western Pacific Railroad Company, under the act of July 1, 1862, and the amendatory acts. The defendant was in possession at the commencement of the action, claiming that the land was public land, and that he had complied with the pre-emption laws. The court below gave judgment for the defendant, and the plaintiff appeals. Inasmuch as the plaintiff relies solely upon a paper title, he must recover upon the strength of that title. It is therefore immaterial whether the defendant's pre-emption proceedings were regular or not. The question is as to the validity of the patent.

Upon the former appeal, the judgment was reversed, because the court below rejected evidence to the effect that, at the time the grant from Congress to the company took effect, the land was within the limits of a Mexican grant then sub judice: Carr v. Quigley, 57 Cal. 395. The necessary result of this decision (although it is not stated in terms) is that,

if at said time the land was within the exterior limits of a Mexican grant then sub judice, the patent was void, and could be attacked collaterally. The case does not appear to have been taken to the supreme court of the United States, and consequently the decision became the law of the case, and is not now subject to review. This is a familiar rule in this state, and, as we understand, it prevails in the federal court: Ex parte Sibbald, 12 Pet. 491, 9 L. Ed. 1169; Bridge Co. v. Stewart, 3 How. (U. S.) 413, 11 L. Ed. 658.

The record before us recites that, upon the retrial in the court below, the defendant "proved by testimony and established," among other things, that the Mexican government, in 1839, granted to Jose Noriega and Robert Livermore a tract of land known as "Las Pocitas," and described as follows, viz.: "Bounded on the north by the Lomas de las Cuevas; on the east by the Sierra de Buenos Ayres; on the south by the dividing line of the establishment of San Jose, and on the west by the rancho of Don Jose Dolores Pacheco; containing in all two square leagues, a little more or less, provided that quantity be contained within the said boundaries; and, if less than that quantity be found to be contained therein, then that less quantity, and all of said described tract of land." This grant was confirmed by the same description by the board of land commissioners on February 14, 1854, and by the United States district court on February 18, 1859. Among the things which defendant "proved by testimony and established" was that the tract in controversy was "within the boundaries designated and set forth in the said decree of the board of land commissioners and the United States district court." And this was expressly stipulated on the motion for new trial. Was this grant sub judice at the time of the location of the line of the road, viz., on April 16, 1868? The decree of the district court was affirmed by the supreme court in 1861, the mandate being filed in the lower court in October, 1865. In that year a "final" survey was made by one Dyer, a deputy in the office of the surveyor general. By this survey it would seem that nearly ten leagues were included in the description above given. This survey was approved by the surveyor general in 1867, and by the commissioner of the land office in 1868, but was set aside by the Secretary of the Interior on July 30, 1868, on the ground that it included a

great deal more land than the two leagues which the grantees were entitled to. A new survey was made in 1869, and approved by the Secretary of the Interior in 1871, and a patent for the two leagues was issued upon this last survey on August 20, 1872.

We think that the grant must be considered sub judice until the final survey was approved by the Secretary of the Interior. The underlying idea of the decision on the former appeal, and of the case which it followed (Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769), was that Congress had not by its grant undertaken to prejudge the validity of claims then pending, but had intended to except the land covered by such claims from the operation of its grant to the company. Now, to say that the congressional grant covered land within the exterior limits of a Mexican grant at a time when it could not be known what portion within those limits the Mexican grant would take, is to say that Congress had prejudged the matter. Until a final survey was made, it could not be known what portion within the exterior limits the two leagues would cover; and until such survey was approved by the Secretary of the Interior it was subject to be set aside by him, as was the case with the Dyer survey, made in 1865.

If, therefore, the case stood as it did at the close of the defendant's evidence, it would, we think, be perfectly clear that the judgment should be affirmed. But, in order to overcome the effect of the defendant's evidence, the plaintiff proved that a "preliminary" survey had been made in 1854 by one Lewis, a deputy in the surveyor general's office. This survey included about four leagues, but did not take in the land in controversy here. It was "approved" by the surveyor general, but the date of such approval does not appear. The plaintiff also put in evidence proceedings in the land office in contests between other parties, and the opinions therein of the commissioner of the land office and the Secretary of the Interior, to the effect that land outside of the Lewis survey was not a part of the rancho; in other words, that the Lewis survey established the exterior limits of the Mexican grant. As a matter of course, the defendant here, not having been a party to such proceedings, cannot be affected by them. They were probably offered by counsel to show that, in the view of the authorities of the land office, the Lewis survey established

the exterior boundaries of the rancho, and were doubtless admitted by the court below upon the somewhat loose principle that, inasmuch as there was no jury, they could do no harm.

It is a very serious question whether the appellant is not precluded by his stipulation from maintaining that the Lewis survey established the exterior boundaries of the rancho. He stipulated in the court below that the tract in controversy is outside of the Lewis survey, and his argument here is based upon that fact, which is necessary to his position. Taking that fact as established, it follows that, if the Lewis survey established the exterior boundaries, the tract in controversy must be outside of them. But the appellant further stipulated in the court below that the tract in controversy is within the exterior boundaries. Can he, in the face of this stipulation, be permitted to affirm on appeal that the tract is not within those boundaries? This argument does not cut both ways. It is true that the respondent stipulated that the tract is outside of the Lewis survey; but he has not stipulated, and does not affirm, that the Lewis survey established the exterior boundaries of the rancho. If, however, we assume, in favor of the appellant, that he is not precluded by the stipulation from maintaining that the Lewis survey established the exterior boundaries of the rancho, we must, with submission to the learned commissioner of the land office and the learned Secretary of the Interior, be permitted to doubt whether this survey had any such effect. We are unable to see how a "preliminary" survey, made before the decree of the district court, could be final, or how, if it was not final, it could "establish" the exterior boundaries of the rancho. The time to appeal to the district court had not expired, and therefore the case was then pending; and that is equivalent to saying that it was sub judice. To say that a pending case is not sub judice is a contradiction in terms. It is equally a contradiction in terms to say that a "preliminary" survey could effect a final segregation. For this reason it seems to us very clear that this survey did not "establish" anything, and we should dismiss the subject without further consideration were it not for the deference due to the opinion of the learned heads of the land department. Their opinion seems to us to rest upon several unfounded assumptions, which we will examine.

1. It is assumed that the Lewis survey was intended to be of the exterior boundaries of the rancho, as distinct from the tract claimed by the grantees; and that, although the survey did not stand as a delineation of the tract to which the grantees were entitled, it might stand as a delineation of a larger tract within which the tract claimed by the grantees was to be located. We see nothing in the record before us which justifies this assumption. In the instructions of the surveyor general to Lewis, it is stated that the attorneys for one of the claimants had applied for a survey of Las Pocitas, "a tract of land claimed by the latter"; that "the claim" had been confirmed, as per the description above quoted, by the board of land commissioners; and that the survey made was to "conform to the above decree." Lewis, who was called as a witness, testified that what he made out was "the initiatory survey of the Rancho Las Pocitas claimed by Robert Livermore." We see nothing to indicate that the survey was intended to be of a tract from which the claim of Livermore was to be segregated. It purported to be what he claimed. It did not stand for this: and we do not see how it can stand for something else which it did not purport to be.

2. It is assumed that the survey was made in pursuance of a statute of the United States. The opinion of Commissioner Drummond says that the survey was "evidently made pursuant to act of Congress approved August 31, 1852." The only act of this date which has any relation to the matter is the general appropriation bill, which contains the following provision: "For surveying private land claims in California which may have been presented in good faith to the board of land commissioners, twenty-two thousand five hundred dollars: provided, that the authority hereby conferred upon the surveyor general shall apply only to such unconfirmed cases as in the gradual extension of the lines of the public surveys he shall find within the immediate sphere of his operations, and which he is satisfied ought to be respected and actually surveyed in advance of confirmation": 10 St. U. S. 91. This claim was not "unconfirmed" by the land commission; it does not appear to have been "within the immediate sphere of his operations" upon the public surveys; and, what seems absolutely conclusive, it was not a survey made at public expense, and hence could not come within the purview of a pro-

vision appropriating public money. The surveyor general, in his instructions to Lewis, expressly says to him: "As this is a preliminary survey, for your compensation you will make arrangements with the claimant. I shall add that under no circumstances will this office be responsible for any surveys connected with the execution of these instructions." The survey, then, was not made under the above-mentioned act of 1852, as supposed by the learned commissioner. He refers for illustration to the act of March 3, 1853; but it is apparent that this act had nothing to do with the Lewis survey. It provides that the surveyor general "shall also cause all private claims to be surveyed after they have been confirmed, so far as may be necessary to complete the surveys of the public lands"; and that "for surveying the base and meridian lines, and private claims, and meandering navigable waters, the deputy surveyor shall be allowed not exceeding sixteen dollars per mile": 10 St. U. S. 245. This provision is for a survey to be made at the public expense where necessary "to complete the surveys of the public lands." The Lewis survey does not appear to have been necessary for that purpose, and was made at the expense of private parties.

It may be added, although it is not suggested by the learned commissioner, that it was not made under the act of 1860, and hence is not within the decision of Southern Pac. R. R. Co. v. Garcia, 64 Cal. 515, 2 Pac. 397. The act of 1860, upon which that case was decided, was passed more than five years after the Lewis survey was made. If it be assumed that it could have any relation to the Lewis survey, there is nothing in the record to show that the publication required by the act was had. We see nothing to indicate that the survey had any official character or stamp. It was expressly said to be merely "preliminary," and was made at private expense; the surveyor general instructing his deputy to "run any lines which any contending parties may desire you to run, if they are willing adequately to compensate you for such work"; and "to qualify as if performing public work." The probability is that the claimants knew that no final survey could be had until the matter had passed through the courts, or the time to appeal had expired, but wanted for their own information to get an approximate idea of where their lines would run; hence this "preliminary" survey.

3. The opinion of the learned commissioner seems to assume that this preliminary survey, which had no force of itself, could derive force from the acts in pais of the claimants; for he dwells at some length upon the fact that the survey was made at the instance of the claimants, who assisted therein, and consequently knew all about where the lines were run, but made no sort of protest or objection thereto. Of this it may be remarked that the record here does not show any such condition of affairs, the statements in the opinion of the commissioner not being evidence against the defendant. But, in addition to this, we do not think that the word "claim," as used in the legislation on the subject, was intended to be controlled or defined by the conduct of the parties. That would be too vague and uncertain a test. The "claims" referred to must have been founded upon writings. And where, as here, the writings were presented to and confirmed by the land commission, the description in the decree could not be added to or varied by the acts in pais of the parties. The principle of estoppel can have no application. In the first place, no action was taken by the government, or by anybody else, upon the faith of this survey; and, in the second place, subsequent preemptioners do not in any sense claim through the claimants under the Mexican grant.

We think the Lewis survey does not overcome the effect of the case made by the defendant, and we therefore advise that the judgment and order denying a new trial be affirmed.

We concur: Belcher, C. C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

I dissent: Paterson, J.

WILSON v. HUNT, Judge.

No. 11,407; January 17, 1888.

16 Pac. 305.

Mandamus—Peremptory Writ—Failure of Record to Show Service.—Alternative mandamus was issued by the chief justice, returnable before Department 2 of this court. On application to the court in bank for a peremptory writ, the record showed no evidence of service on respondent, and no return by him. Held, that the application must be denied.

Original proceeding by petition for mandamus.

Baum & Gradwohl for petitioner.

Per CURIAM.—This is an application for a writ of mandamus, requiring respondent to substitute M. C. Baum as attorney for plaintiff in case of Wilson et al. v. Tobin et al. The alternative writ was issued by the late chief justice on the seventh day of September, 1886, returnable before Department 2 of this court, September 10, 1886. We find no evidence of service on respondent in the record, and he has, so far as appears, made no return. Petitioner now moves to make the writ absolute.

The application must be denied. If petitioner has, at this date, any rights in the premises, they can be asserted in Department 2 of this court.

FARNUM v. HEFNER.*

No. 12,351; January 25, 1888.

16 Pac. 324.

Landlord and Tenant—Sale of Leasehold—Rights of Purchaser. A lessor sued defendant for a conversion of crops grown on a leasehold purchased by defendant under execution against the lessee. The lease provided that crops grown on the premises should be the lessor's

*For subsequent opinion in bank, see 79 Cal. 575, 21 Pac. 955.

property until the lessee performed certain conditions. Held, that as the conditions had not been performed, the purchaser acquired no right to the crop, and the judgment-roll and execution were properly excluded from evidence, as immaterial and irrelevant.

APPEAL from Superior Court, Butte County; L. D. Freer, Judge.

Action by C. E. Farnum against Philip Hefner, to recover the value of certain wheat and hay. There was a trial by the court, and judgment was given for the plaintiff. The defendant appeals.

H. V. Reardan for appellant; Carter P. Pomeroy for respondent.

FOOTE, C.—This is an action to recover the value of certain wheat and hay claimed to be the property of Farnum, and alleged to have been converted to his own use by Hefner. The plaintiff recovered judgment for the value of the wheat. A motion for a new trial was made and denied, and from the order made in the premises an appeal has been taken. The facts of the case are that on October 15, 1884, the plaintiff was the owner of certain farming land in Butte county, and at that date made a written lease of the same to one D. L. Butler for a term of two years. On February 24, 1885, Hefner, the defendant herein, recovered a judgment against Butler in the superior court of Butte county for a considerable sum of money, and had execution duly issued and levied upon the leasehold interest held by Butler, which was afterward sold under that writ, and purchased by the defendant. Thereupon he entered into possession of the land which Butler had leased, and proceeded to harvest the crop of growing wheat thereon. After the grain was sacked, and the defendant in possession of the whole of it, he offered the plaintiff one-third of it, which, after at first refusing, he afterward received. The defendant kept the other two-thirds of the wheat, and converted it to his own use, and was sued for its value in this action.

It is claimed by the defendant that the court erred in refusing to admit in evidence the judgment-roll, execution, and return thereon, under which the defendant claimed title to

the leasehold interest of Butler, the judgment debtor. This point is not well taken, for the reason that the lease in express terms invested the legal ownership of the entire crop of wheat to be raised and grown upon the leased land in Farnum until the performance of certain stated conditions, and therefore, those conditions not having been complied with, when the defendant bought the leasehold interest of Butler he bought no right to convert the property which belonged to Farnum; and therefore the judgment-roll, execution, etc., were immaterial and irrelevant to the issues joined. Until the delivery of the whole of the crop of wheat to Farnum, and a transfer to Butler of his portion by Farnum, the latter was, according to the terms of the lease, the absolute owner of the wheat; and until those conditions had been fulfilled neither Butler, the lessee, nor Hefner, the claimant of the leasehold interest under the judicial sale, could have any legal claim to its possession. Farnum owned the wheat, as the conditions of the lease remained unperformed, and was entitled to recover for its conversion without reference to what interest, if any, passed to Hefner in the demised premises under the sheriff's sale: Howell v. Foster, 65 Cal. 169, 3 Pac. 647, and cases cited.

It becomes unnecessary to determine the other point made by the defendant, viz., that the court committed error in admitting in evidence a written forfeiture of the lease made and executed by Butler, between the time of the levy of the execution and the sale thereunder; for conceding without deciding, that the lease was in full force and effect, so far as Hefner's rights were concerned, at the time of the judicial sale, he acquired no right thereby to any of the wheat owned by Farnum, and therefore the admission in evidence of the forfeiture was immaterial, and could work no prejudice to the defendant.

The order appealed from should be affirmed.

We concur: Hayne, C.; Belcher, C. C.

By the COURT.—For the reasons given in the foregoing opinion the order is affirmed.

In re ALLEN.*

No. 12,237; January 25, 1888.

16 Pac. 319.

Homestead—Property Used in Connection With Dwelling.—Where the family of an insolvent consisted of eleven persons, and his house on one lot contained three bedrooms, and on another lot was his well, cow-house, and other out-buildings, and also a building containing a wagon-shop, rented out by the insolvent, and a blacksmith-shop used by him, and in the unfinished upper part of the building some of his family slept, and which, when able, he intended to finish to use with his house, both lots were properly set off as a homestead.

APPEAL from Superior Court, Butte County; Leon D. Freer, Judge.

Albert Allen, an insolvent, made his application under the insolvent law for a homestead. The court ordered the property claimed set apart as a homestead, from which order the assignee appealed.

F. C. Lusk for appellant; Park Henshaw for respondent.

HAYNE, C.—Appeal from a judgment setting aside a homestead under the insolvent law. The homestead set apart consisted of lots 4 and 5, in block 39, of the town of Chico. These two lots adjoined each other. Upon lot 5 was the dwelling-house, and upon lot 4 were certain out-buildings and a blacksmith-shop. The two lots and buildings were together under the value of five thousand dollars. It is conceded that the order was proper as to lot 5, but it is argued that lot 4 was used exclusively for business purposes, and that, therefore, there could not be an actual residence upon it. It appears, however, that a part, at least, of lot 4 was used for family purposes. The court finds that "the well, cow-house, chicken-house, wood-shed, and other out-buildings necessary and convenient for the use of said premises, are situate upon lot 4." This we think is not contradictory of the other find-

*For subsequent opinion in bank, see 78 Cal. 293, 20 Pac. 672.

ings, when all are taken together. It appears from the evidence that the cow-shed was built in 1884–85. "Before it was built there was a wood-house there. The barn now is used for the same purpose that the old one was; wood-house, chicken-house, and cow-shed combined."

The homestead is not restricted to the ground actually covered by the dwelling-house. It includes the additional ground which is necessary or convenient for family use. In this regard Sanderson, J., delivering the opinion in Gregg v. Bostwick, 33 Cal. 227, 91 Am. Dec. 637, said: "It represents the dwelling-house at which the family resides, with the usual and customary appurtenances, including out-buildings of every kind necessary or convenient for family use, and lands used for the purposes thereof. If situated in the country it may include a garden or farm. If situated in town it may include one or more lots or one or more blocks. In either case it is unlimited by extent merely." The rule laid down in this case has been frequently approved and followed. And in pursuance of it the court held, in Englebrecht v. Shade, 47 Cal. 627, that the use of an adjoining lot "for the purpose of drying clothes, and as a means of access to the street," was sufficient to support a declaration of homestead including it. So, in Skinner v. Hall, 69 Cal. 195, 10 Pac. 406, it was held that a portion of a lot used as a chicken-yard was properly included in the homestead. The above-mentioned portion of lot 4 certainly comes within the rule of these cases. It must be presumed that the legislature intended that the family should have water to drink, and wood to cook with. And inasmuch as a cow and a certain number of chickens are exempt from execution, it is reasonable to suppose that it was the intention that there should be a place to keep them. A portion of lot 4, therefore, was clearly properly treated as part of the homestead. As to the remainder of this lot there is more doubt. The facts concerning it are as follows: On one end of the lot is a two-story frame building eighty by forty feet, which is equal to about half of the area of the lot. The lower part of this building is divided into two portions. The front portion was used by the insolvent as a blacksmith-shop. The rear portion was occupied by one Canfield as a wagon-shop. The insolvent and Canfield seem to have been in some way interested together in these undertakings, for the court

finds that "the wagon and blacksmith business was carried on in conjunction by Allen and Canfield." The portion of lot 4 not covered by buildings was used for the purpose of storing wagons, setting tires, and other work connected with the blacksmith and wagon shop. The business does not appear to have been conducted on a large scale.

The family of the insolvent was a large one. According to the evidence it consisted of eleven persons, "counting my wife and myself and a small girl we have to stay with us." In the house on lot 5 there were only three bedrooms. The court finds that "the small dwelling-house situate upon lot 5 is not sufficient for the needs of the family of said Allen," and that "said Allen intended, when said shop was built, to occupy the upper part or story in connection with the small house on lot 5 as his dwelling, and has, so far as his means permitted, prepared, used, and occupied it as such, and . . . . that it is necessary for the use of his family." The court further finds that the insolvent "has been unable to complete the upper story as intended, for want of means to do so," and that "said building has never been finished off on the inside, either by boarding, ceiling, lathing, plastering, or otherwise"; but that "said upper story of the shop has been, since its erection, used as a sleeping-room for members of Allen's family." One of the rooms in the upper floor was rented out as a paint shop. Another was occupied jointly by one Nigro (who was one of the painters) and one Hall, which latter worked for the insolvent, but received no regular salary, and "boarded at said debtor's dwelling-house, and was considered one of the petitioner's family." At one time another painter lived in the upper floor with his family. Some of the insolvent's sons were in the habit of sleeping in the upper floor wherever they could find a place for their mattresses. Upon the whole evidence we cannot say that it was insufficient to support the finding that "said upper story of the shop has been, since its erection, used as a sleeping-room for members of Allen's family."

Taking this as established, it does not seem to us that the appellate court can say that there was no actual residence upon this part of the property within the meaning of the homestead law. When property is used both as a residence and for business purposes, the question of homestead is always

a difficult one. The mere fact that it is partially used for business purposes is not of itself sufficient to defeat the homestead. This is recognized in Gregg v. Bostwick, cited for the appellant, for the court there says: "If, however, it is used as a place of business by the family, which frequently happens, it may not therefore cease to be a homestead, if it would be necessary or convenient for family use, independent of the business": 33 Cal. 228, 91 Am. Dec. 637. So the mere fact that a portion of the property is rented out is not of itself sufficient to defeat the homestead: Skinner v. Hall, supra; Ackley v. Chamberlain, 16 Cal. 181, 76 Am. Dec. 516. Each case must depend in great measure upon its own circumstances. But where the property is necessary and convenient for family use, and is put to such use, we think the homestead should be sustained, unless business is the primary and principal purpose of the property, and the family use merely incidental. Upon the whole, although the case is a close one, we are not convinced that the judgment of the court below was erroneous. Some of the rulings on the admissibility of evidence do not seem quite correct, but we do not think that injury could have resulted.

We therefore advise that the judgment and order be affirmed.

We concur: Belcher, C. C.; Foote, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

MALLAGH v. MALLAGH et al.*

No. 11,859; February 4, 1888.

16 Pac. 535.

Resulting Trusts — Establishment by Parol.—Plaintiff made a deed to her son of real property, with an understanding that he should satisfy her debts, and reconvey the remainder to her. In effecting a compromise with certain parties, the son, in consideration of a deed

*For subsequent opinion in bank, see 77 Cal. 126, 19 Pac. 256.

of certain other of plaintiff's property, procured the property in dispute to be conveyed to him. Civil Code of California, section 852, enacts that no trust of real property is valid unless created by writing or operation of law. In an action to have the heirs of the son declared trustees, held, that parol evidence was admissible to show the nature of the dealings between plaintiff and her son, and to establish a trust in her favor.

Resulting Trust—Laches.—Plaintiff had Owned the Beneficial Interest in property, and had been in possession thereof since 1879, and was in possession in 1883, when she brought action to have defendants, who held the naked legal title, declared trustees for her. Held, that the plaintiff was not guilty of laches in asserting her rights.

Searls, C. J., McKinstry and Temple, JJ., dissenting.

APPEAL from Superior Court, San Luis Obispo County; D. S. Gregory, Judge.

Juana Corrillo de Mallagh brought this action against Isabel Roco de Mallagh and Edna Mallagh, the widow and infant child of her son, David Mallagh, to establish a trust in plaintiff's favor of certain land of which said David Mallagh died seised. Plaintiff, being financially embarrassed, with a view to making a settlement with her creditors, made a conveyance in July, 1877, to her son, said David Mallagh, of property, which was subsequently sold under foreclosure proceedings, and purchased by the trustees of the estate of one Thompson, but plaintiff retained possession. It was claimed that the foreclosure suit was irregular, and that the grantees under the sheriff's deed acquired no title. A compromise was effected, whereby the purchasers at the foreclosure sale were to convey to the plaintiff the property in dispute, and were to receive a conveyance of certain other of plaintiff's property. David Mallagh procured a conveyance to be made to himself of the property plaintiff was to receive under this agreement, but plaintiff did not become aware of it until the month of January, 1882. David Mallagh died in March, 1883, leaving him surviving the defendants, his only heirs at law, and shortly afterward this action was brought. The judgment of the court below was in plaintiff's favor. Defendants appeal. Civil Code of California, section 852, referred to in the opinion, reads as follows: "No trust in relation to real property is valid unless created or declared (1) by a written instrument, subscribed by the trustee, or

by his agent thereto authorized by writing; (2) by the instrument under which the trustee claims the estate affected; or (3) by operation of law."

Venable & Goodchild and W. H. Spencer for appellants; Graves, Turner & Graves for respondent.

FOOTE, C.—This is an action to establish and enforce a trust. It appears that the plaintiff has been divorced from her husband; and being largely in debt, and her property mortgaged, desired to effect some compromise with her creditors whereby she might retain for herself some part of her estate. With that end in view, and acting in perfect good faith, she made to her son, David Mallagh, a deed of the property set out in the complaint herein. This son was a person in whom she reposed the utmost confidence, and she always acted as he advised her to do. Proceeding under his advice, she executed to him a deed to her property, with the understanding and agreement that he should satisfy the claims of her creditors, and, if anything remained after that, he was to reconvey it to her. The creditors sold the property (which had been mortgaged to them) at a foreclosure sale, and purchased it. A dispute arose as to whether or not that sale was good, and gave the purchasers a perfect title to the plaintiff's property. She retaining possession of it, her son, David, effected a compromise and agreement with the purchasers at the foreclosure sale that they should accept from him for his mother a deed to a portion of her property, and should then deed to her the property now in dispute. He deeded that which he had promised to the creditors, but, instead of having them (as had been agreed upon) to convey the property now in dispute to his mother, he took from them a deed of it to himself. His mother remained in ignorance of that fact until a short time prior to his death. Then she, having discovered what he had done, applied to him to make her a conveyance of the property, which he refused to do, and never did so convey it. There is nothing to show that in making the deed to the creditors he either had repudiated, or intended to repudiate, his mother's right. For all that appears to the contrary, he at that time intended to act fairly by her; in other words, that he made the conveyance as her

agent. In this sense, what the creditors accepted as the consideration of their deed, came from the plaintiff. The court below decreed that David Mallagh was trustee for his mother, and, being deceased, the defendants, his only heirs at law, in privity with him, held the property in trust for the plaintiff, and that equitably it should be conveyed to her. From that judgment, and an order denying a new trial, the defendants have appealed.

It is argued that parol testimony was not admissible to show the facts surrounding the transaction between the parties thereto. But this view, we think, is untenable, for the reason that all the property which remained after the satisfaction of the creditors' claims was held by David Mallagh in trust for his mother. The only consideration which ever passed to the creditors and purchasers under the foreclosure sale for the deed which they executed to David Mallagh, instead of his mother, to whom they promised to convey it, was that which came from the plaintiff. She originally conveyed it to her son, and agreed that he might compromise her debts, and, when he did so by the deed he made to the trustees of the Thompson estate, it was done by him as the agent and trustee of his mother, who thereby furnished the property thus conveyed as a consideration for the creditors to convey to her the property in dispute, for it is not necessary that money alone should be the consideration in such a matter: Currey v. Allen, 34 Cal. 254. The fact that they conveyed to her agent and trustee did not defeat her equitable right to have the title vested in her, as had been agreed upon.

Under our code, resulting trusts may arise by operation of law (section 852, subd. 3, Civil Code), and such trusts may be established by parol: Millard v. Hathaway, 27 Cal. 119; Bayles v. Baxter, 22 Cal. 575. Judge Story, in his work upon Equity Jurisprudence, volume 2, thirteenth edition, section 1195, declares that implied trusts include both resulting and constructive trusts. This court has held, in common with many others, that parol evidence is admissible to show an implied trust, whether the same be presumed "from the supposed intention of the parties, and the nature of the transaction, when they are known as 'resulting trusts'; or they are raised independently of any such intention, and forced on the conscience of the trustee by equitable construction and

the operation of law; and such are distinguished as 'constructive trusts.' These trusts are expressly exempted from the operation of the statute of frauds'': Millard v. Hathaway, 27 Cal. 119. Upon examination, we think that the evidence supports the findings.

As to the suggestion made by the respondents' counsel that the plaintiff was guilty of laches in failing to assert her rights, it is only necessary to say she had been in possession of the premises in controversy since 1879 and owned the entire beneficial interest therein. The respondents were out of possession, and held the naked legal title for the plaintiff; hence the latter might with safety rest content until the former took some steps to disturb her in the enjoyment of her rights: Barroilhet v. Anspacher, 68 Cal. 121, 8 Pac. 804.

No prejudicial error appearing, we are of the opinion that the judgment and order should be affirmed.

We concur: Beleher, C. C.; Hayne, C.

By the COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

Searls, C. J., McKinstry and Temple, JJ., did not concur in the opinion.

HUGHES v. THOMPSON.

No. 12,214; February 6, 1888.

16 Pac. 532.

Appeal—Defects not Apparent on the Record.—On appeal from an order of court granting a new trial, where no briefs are presented, and there is nothing to show upon what grounds the court granted the motion, the order will be affirmed.

APPEAL from Superior Court, Fresno County; R. E. Arick, Judge.

Terry & Terry for appellant; H. S. Dixon for respondent.

By the COURT.—The appeal is from an order granting plaintiff's motion for a new trial. No briefs have been filed.

There is nothing to show upon what grounds the court below granted the motion. We do not feel called upon to search the record for the purpose of determining whether the court erred. We presume that a new trial was properly ordered. Order affirmed.

SCOTT et al. v. SOWDEN, Justice of the Peace.

No. 12,123; February 21, 1888.

16 Pac. 768.

Appeal—No Appearance or Brief by Appellant.—Where there is no appearance by appellant, and there are no points or authorities filed in his behalf, the judgment appealed from will be affirmed.[1]

APPEAL from Superior Court, Nevada County; J. M. Walling, Judge.

The petition of William Scott and Raphael Solari against William P. Sowden, justice of the peace, for a writ of mandate to compel the suspension of certain proceedings in respondent's court, and compel him to certify the same to the superior court, was denied, and plaintiffs appealed.

Cross & Simonds for appellants; A. D. Mason and William P. Sowden for respondent.

FOOTE, C.—There being no appearance on the part of the appellant, and no points or authorities filed on his behalf, the judgment and order appealed from should be affirmed.

We concur: Belcher, C. C.; Hayne, C.

Per CURIAM.—For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

[1] **Cited** in Peek v. Peek, 75 Cal. 299, 17 Pac. 214, where the court state the rule to be that "where the appellant neither makes an oral argument nor files any brief the court will affirm the judgment without an examination of the record."

PEOPLE v. O'LEARY.*

No. 20,358; February 29, 1888.

16 Pac. 884.

Criminal Law — Plea of Former Acquittal.—Deering's Penal Code of California, section 1017, provides that a plea must be entered upon the minutes of the court in substantially the following form: "(3) If he plead a former conviction or acquittal: 'The defendant pleads that he has already been convicted [or acquitted] of the offense charged by the judgment of the court of,'" etc. "(4) If he plead once in jeopardy: 'The defendant pleads that he has been once in jeopardy for the offense charged [specifying the time, place, and court].'" Defendant asked to have entered, as a plea of former acquittal: "Defendant pleads that he has already been acquitted of the offense charged by the judgment of this court, rendered at this courtroom on the fourteenth day of February, 1887, when defendant's demurrer to plaintiff's information was sustained by the court, and said court then and there or at any time failed to render its opinion that the objection to said demurrer could ever be cured by filing a new information." Held a sufficient plea of former acquittal.[1]

Criminal Law—Plea of Former Jeopardy.—Defendant asked to have entered, as a plea of once in jeopardy: "Pleads, further, that he has been once in jeopardy, he having on the ——— day of January, 1887, been placed on trial for the offense now alleged in the information before the justice court of Cache Creek township and a jury, which court was a competent court, and which jury was a competent jury; and witnesses against defendant were sworn before said jury, and, before the final submission of said matter to said jury, the jury was discharged, against the objection of the defendant." Held, a sufficient plea of once in jeopardy.

Criminal Law—Failure of Clerk to Enter Plea Properly.—The failure of the clerk to make the entry as fully as he ought to have done could not prejudice defendant.

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*For subsequent opinion in bank, see 77 Cal. 30, 18 Pac. 856.

1 **Cited** with approval in State v. Kieffer, 17 S. D. 69, 95 N. W. 290, when on an appeal from a conviction of grand larceny the court say that it was error in the court below "to enter judgment against the accused upon the plea of not guilty, unless the plea of former jeopardy had been disposed of by the jury."

Cited, hardly with pertinence, in Gaines v. United States, 1 Ind. Ter. 301, 37 S. W. 100, under the remark "Announcing ready for trial and going to trial without objection waives arraignment and plea."

Criminal Law—Pleas—Verdict.—Defendant entered three pleas: First, not guilty; second, a former acquittal; third, once in jeopardy. The jury found only on the first. Held, that there could be no conviction without a verdict on each plea.[1]

APPEAL from Superior Court, Yolo County; C. H. Garoutte, Judge.

Information against Arthur O'Leary for practicing medicine without a certificate. Defendant was convicted, and appeals.

R. Clark for appellant; Geo. A. Johnson, attorney general, for the people.

BELCHER, C. C.—The information filed against the defendant charged him with practicing medicine at a time when he had not obtained a certificate authorizing him to do so, as required by the "Act to regulate the practice of medicine in the state of California" (Deering's Penal Code, pages 625–629). The defendant demurred to the information, and his demurrer was overruled. We see no error in this ruling. The information charged the offense in language sufficiently full and explicit. The defendant then pleaded not guilty, and asked to have further pleas entered as follows: "Further pleading to said information, defendant pleads that he has already been acquitted of the offense charged by the judgment of this court, rendered at this courtroom on the fourteenth day of February, 1887, when defendant's demurrer to plaintiff's information was sustained by the court, and said court then and there or at any time failed to render its opinion that the objection to said demurrer could ever be cured by filing a new information. Pleads, further, that he has been once in jeopardy, he having, on the —— day of January, 1887, been placed on trial for the offense now alleged in the information before the justice court of Cache Creek township and a jury, which court was a competent court, and which jury was a competent jury; and witnesses against defendant were sworn before said jury, and, before

[1] Cited and followed in Putman v. State, 6 Okl. 141, 117 Pac. 461, where one charged with unlawfully selling whisky had entered the two pleas of "not guilty" and "former conviction."

the final submission of said matter to said jury, the jury was discharged, against the objection of the defendant." The court refused to allow these pleas to be entered, on the ground that they were not pleas recognized by the statutes, and the defendant excepted to the ruling. As entered upon the minutes of the court, the pleas were as follows: "First, defendant pleads not guilty of the offense charged; second, a former acquittal; third, once in jeopardy." The jury found the defendant guilty, but did not find on the issues of former acquittal and once in jeopardy. Judgment was entered that defendant pay a fine of five hundred dollars, and, in default of payment, be imprisoned in the county jail for the term of five hundred days, or at the rate of one day for each dollar of the fine, and from that judgment he has appealed.

The rule is well settled in this state that if, in a criminal case, there be a plea of not guilty, and also a plea of former conviction or acquittal, the defendant is entitled to a verdict on each plea, and until there is such a verdict there can be no judgment of conviction: People v. Kinsey, 51 Cal. 279; People v. Helbing, 59 Cal. 567; People v. Fuqua, 61 Cal. 377. The attorney general, while admitting the correctness of the decisions referred to, urges that defendant's pleas of former acquittal and once in jeopardy, as entered by the clerk, did not meet the requirements of section 1017, Penal Code, and for that reason he was not entitled to any findings upon them. That section provides as follows: "Every plea must be oral, and entered upon the minutes of the court, in substantially the following form: . . . . (3) If he plead a former conviction or acquittal: 'The defendant pleads that he has already been convicted [or acquitted] of the offense charged by the judgment of the court of ——, [naming it,] rendered at ——, [naming the place,] on the —— day of ——.' (4) If he pleaded once in jeopardy: 'The defendant pleads that he has been once in jeopardy for the offense charged [specifying the time, place, and court].' " The pleas of former acquittal and once in jeopardy, as the defendant asked to have them entered, were in substantially the form required by the code. They were oral, and the clerk was to enter them on the minutes of the court. If the clerk failed to make the entry as fully as he ought to have done, the defendant cannot be made

to suffer for that failure. If the failure was by reason of the order of the court, the order was erroneous, and is cause for reversal.

We think the judgment should be reversed and the cause remanded for a new trial.

We concur: Hayne, C.; Foote, C.

Per CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

BOYLE v. SOLSTIEN et al.

No. 11,665; March 1, 1888.

16 Pac. 898.

Default—Judgment—Motion to Set Aside—Discretion.—To set aside a judgment by default on motion and affidavits showing that defendant's attorney had suddenly died, and that defendant himself had no knowledge of the case, is not an abuse of the court's discretion.

APPEAL from Superior Court, City and County of San Francisco; Walter H. Levy, Judge.

John Boyle sued H. A. Solstien and J. A. Arden, executors of Patrick Foley. Judgment against defendant by default, proper service having been made. On motion and affidavits, after notice to plaintiff, the same was set aside, and defendant allowed to plead, on the ground of excusable surprise, inadvertence, and neglect in that defendant's attorney in charge of the case had suddenly died, and defendant himself had no knowledge of it. From this order plaintiff appeals.

J. M. Wood for appellant; Charles F. Hanlon for respondent.

Per CURIAM.—The court did not abuse its discretion in granting the motion to set aside the default and judgment. Order affirmed.

In re BARNES.

No. 11,756; March 2, 1888.

16 Pac. 896.

Attorney—Disbarment for Offering Money for Testimony.—An attorney, believing a certain paper to be a forgery, hired an expert to examine it. The expert expressed his doubt as to the forgery; and the attorney, supposing that the expert believed the paper a forgery, and only expressed doubt to extort money, offered him a large sum of money to testify in regard to the forgery. Held, that such conduct was subject to criticism, but not sufficient ground for disbarment.

Attorney—Disbarment—Procuring Person to Steal Papers.—The respondent was charged with procuring one to steal a paper, but the only evidence against him was the testimony of the party who lost the paper that the person who stole it said that respondent had hired him to steal it. Held, that such statement was not evidence, and the respondent could not be disbarred on the charge.

Application to disbar.

This was an application to disbar W. H. L. Barnes, upon accusations preferred by James L. Crittenden, complainant. The respondent, Barnes, is charged in and by the complaint—First, with having "been guilty of the violation of his oath as an attorney and counselor at law"; secondly, with having "been guilty of the violation of his duty as an attorney and counselor at law"; thirdly, with having been guilty of "corrupt practices, tending to degrade and defeat the due administration of justice." The complaint further specifies two instances wherein said Barnes was guilty as alleged, to wit: First. That said Barnes, after M. Gumpel had informed him that certain letters and a contract of marriage introduced in evidence in the case of Sharon v. Sharon were written and signed by William Sharon, in his opinion, and that he (M. Gumpel) could not testify in favor of William Sharon, and against the genuineness of said letters and contract, "willfully and corruptly tried to induce said M. Gumpel to commit perjury, and swear that the signature of said Sharon to said contract was not his genuine signature, and that said letters were not written or signed by said Sharon, and willfully and corruptly offered to pay said M. Gumpel a large sum of

money if said M. Gumpel would so swear, which said M. Gumpel declined to do." Secondly. That respondent, Barnes, requested one McLaughlin, the clerk of George W. Tyler, to go to the office of said Tyler and procure a written contract which he (Barnes) supposed to have been made between George W. Tyler and M. Gumpel, and to take it and deliver it to him (Barnes) for money which he (Barnes) promised to pay; and that said McLaughlin, in order to earn the money so corruptly offered him by said Barnes, went to the office of said Tyler in the night-time, in the absence of Tyler, and stole therefrom a private paper belonging to Tyler, purporting to be such contract, and delivered the same to said Barnes, who paid said McLaughlin therefor the sum of twenty-five thousand dollars; and that said Barnes paid said money to said McLaughlin for said contract with the corrupt intent to use the same in evidence in the suit of Sharon v. Sharon; and that said Barnes did afterward use said paper as evidence in said suit of Sharon v. Sharon. The respondent pleads not guilty to these charges.

James L. Crittenden for complainant; John H. Curry for respondent.

TEMPLE, J.—I think the accusation should be dismissed. As to the first specification, the charge as made has not been established by evidence which satisfies my judgment. It does appear, however, that Gumpel was employed by the defendant in the case of Sharon v. Sharon to examine the alleged marriage contract, with the expectation that he would be called as a witness if his opinion was favorable. After the examination had been made, the respondent was induced to believe the result favorable to his wishes, and Gumpel was paid fifteen hundred dollars on account. Gumpel from the first talked of his poverty, of his urgent need for money, and insisted that it was a great case, and he expected to be liberally paid, and that there should be an agreement that his bill should be paid whatever it might be, and sometimes argued against the views of respondent in regard to the genuineness of the signature. Respondent, however, never supposed that Gumpel had any doubts as to the question of forgery, but thought he was merely attempting to get more money. Never-

theless, he continued to rely upon Gumpel, and paid him some money after this evidence of venality, and even intimated that he would probably be satisfied as to his compensation. Now, it must be borne in mind that Gumpel was employed to assist and advise the defense. On any other hypothesis the sum he had already received would be extortionate, or must have been received for the testimony he was to give. However much it may be regretted, we know that experts are often employed and paid large sums for their services, and practically for their testimony; for it often requires labor as well as skill to examine and determine the question upon which an opinion is to be given, and sometimes to prepare an effective exhibit of the facts for the court. The money paid was understood by both parties to be for such services, and I do not believe that Barnes thought that the money would cause the witness to change his opinion or his evidence as to the genuineness of the signature. The respondent knew, or thought he did, that the signature was a forgery, and he seems never to have doubted that Gumpel was of the same opinion, and he regarded, as he well might, the occasional arguments of the witness on the other side as mere intimations that he wanted some money. Under such circumstances, no doubt, it would have been more in accordance with exalted ideas of propriety for Barnes to have denounced the witness, and dismissed him, but I doubt whether many practitioners would have acted very differently from the course of the respondent. Lawyers meet and are compelled to contend with all sorts of people. They have in their hands the interests of their client, and they should not permit him to lose the benefit of important testimony upon any refined ideas of propriety. Frequently witnesses whose testimony is essential know the value of their position, and too often attempt to realize upon it. It is a trying thing for an attorney to be placed in a situation where he must deal with such a witness; and, while an honorable attorney would be careful to make no payments or promises which could affect the truthfulness of the evidence, all would try to retain the witness, however much he would be compelled to despise him. I have considered the matter entirely from the standpoint of the respondent; and while I think his conduct, according to his own testimony,

may justly be criticised, I do not think it sufficient ground for a disbarment.

As to the other charge, it is still more proper to regard it entirely as the facts appeared to the respondent. He is not more guilty than he would have been had the document been genuine, and availed to expose the forgery of the signature of Sharon, and that it was being supported by perjured testimony. The denouement—the discomfiture of Barnes—showing that he had been duped, must be left out of view. If the facts had proven to be as he believed they were, and the result as he anticipated, most people, I think, would have applauded his conduct. There is no evidence in this record to show that Barnes advised McLaughlin to steal the paper, or induced him in any way to take it from the custody of Tyler. That idea is founded, so far as this case is concerned, entirely upon the statements of Tyler as to what McLaughlin told him. That, of course, is not evidence, and, in my judgment, not worthy of credence if it were. Had that fact appeared by legal and creditable evidence, I agree that Barnes' position would be indefensible. It is bad enough, no doubt, as it is. But detective work must be judged by an ethics of its own. It is deemed proper to deceive and practice stratagems upon a public enemy, and the criminal is the common enemy of all. I concur in discharging the accused, while regretting that one so high in the profession should have been guilty of conduct which requires explanation.

I think the respondent should neither be disbarred nor suspended. It is fair to repeat that all the facts have been viewed as I think they appeared to respondent. The allusions to Gumpel must be understood in that light. The accusation is dismissed.

McFARLAND, J., SHARPSTEIN, J., and PATERSON, J.—We concur in the judgment, because in our opinion, the evidence utterly fails to show any conduct on the part of respondent for which he should either be disbarred or suspended.

THORNTON, J.—I concur in the conclusion reached in Justice Temple's opinion on the second specification of the accusation, which relates to the Tyler-Gumpel contract. I do

not concur in the conclusion reached as to the first specification.

Searls, C. J., was not present at the hearing, and did not participate in the decision.

DUNPHY v. HEINMANN.

No. 11,189; March 15, 1888.

17 Pac. 5.

Appeal—Frivolous.—Where the Finding in Ejectment is that defendant did not "wrongfully or unlawfully enter upon or oust plaintiff" from the possession of the premises, an appeal on the ground that there was no finding upon the issue as to ouster is frivolous.

APPEAL from Superior Court, Monterey County; John K. Alexander, Judge.

Ejectment by William Dunphy, plaintiff, against Fritz Heinmann, defendant. Judgment for defendant, and plaintiff appeals.

William H. Webb for appellant; Geil & Morehouse for respondent.

Per CURIAM.—Appeal from the judgment. The only point made is that there was no finding upon the issue as to ouster. It is found that plaintiff was not at any time the owner of the premises, or entitled to the possession thereof or any part of the same, "nor did defendant, during any of said time, wrongfully or unlawfully enter upon or oust the plaintiff therefrom, nor then nor now wrongfully withhold the same or any part thereof from plaintiff." This appeal was evidently not taken in good faith, and is frivolous.

Judgment affirmed, with fifty dollars damages for taking a frivolous appeal.

LONGNECKER v. HIS CREDITORS.

No. 12,268; March 21, 1888.

17 Pac. 220.

Insolvency—Setting Aside Discharge—Discretion.—The disposition of a motion to set aside a decree of final discharge in insolvency rests largely on the discretion of the nisi prius court, and will not be reviewed except in case of an abuse of that discretion.

APPEAL from Superior Court, Butte County; Leon D. Freer, Judge.

W. R. Felter, one of the creditors of G. H. Longnecker, an insolvent debtor, filed in the superior court an opposition to the insolvent's discharge, which opposition was demurred to. Felter's attorney confessed the demurrer, and fifteen days were allowed in which to amend the opposition, but no amended opposition was filed within the time granted, and a default was entered, and the insolvent discharged. The motion to set aside the default was based upon an alleged verbal understanding between the parties as to the filing of the amended opposition.

Albert M. Johnson for appellant; W. J. Herrin for respondent.

Per CURIAM.—This is an appeal from an order denying a motion to set aside a decree of final discharge in insolvency. The motion was based upon the inadvertence, surprise, excusable neglect, etc., of the appellant. The disposition of motions of this kind rests largely in the discretion of the nisi prius court; and in this case we see no such abuse of discretion as would warrant us in disturbing the ruling of the court below. Order affirmed.

MARKHAM v. FOWLER et al.

No. 11,098; March 26, 1888.

17 Pac. 228.

Appeal—Failure to File Briefs.—A case to be submitted on briefs will be dismissed for failure to file briefs within the time allowed.

APPEAL from Superior Court, City and County of San Francisco; T. H. Rearden, Judge.

Bennett, Wiggington & Creed for appellant; J. M. Wood for respondents.

Per CURIAM.—The above-entitled cause having been ordered submitted on briefs to be filed within thirty days from February 14, 1888, and the time having expired, and no briefs having been filed, it is ordered the judgment appealed from be affirmed.

Ex Parte McDONALD.

No. 20,405; March 26, 1888.

17 Pac. 234.

Supplementary Proceedings — Contempt — Habeas Corpus.—Where, in proceedings supplementary to execution, defendant pleads a previous discharge in insolvency, and refuses to answer questions as to her property, and is committed for contempt, her remedy is by appeal, and not by habeas corpus.

Petition for writ of habeas corpus.

Petitioner, Maggie McDonald, was intrusted by another with several thousand dollars to purchase mining stock for her. Petitioner received the money to invest on account of such person, and so agreed to invest same. On demand for delivery of the stock, the petitioner refused, and afterward sold the stock for which judgment was given against her. Exe-

cution issued, and court ordered petitioner to answer certain questions as to her property, which she refused, pleading a discharge in insolvency previously given her, and she was committed for contempt. Petitioner sued out this writ.

George W. Tyler for petitioner; Charles F. Hanlon in opposition.

Per CURIAM.—The petitioner, being restrained of her liberty, sues out a writ of habeas corpus, praying to be discharged upon the ground that the judgment under which the proceedings were had which resulted in her imprisonment for contempt had been discharged by subsequent proceedings under the insolvent laws of this state. The superior court had jurisdiction to hear and determine this question, and, it would appear, did determine it adversely to the petitioner. If wrong in so doing, it is but error, and petitioner's remedy, if any, is by appeal. The application is denied, and petitioner remanded to the custody of the sheriff of the city and county of San Francisco.

HUGGINS et al. v. HANDY et al.

No. 11,347; March 29, 1888.

17 Pac. 533.

Appeal—Failure to Appear or File Authorities—Excuse.—That a case was set for the last day of the session of the supreme court, and the court for years past had never been able to finish the calendar, and that defendants' attorney did not expect the case to be reached, is not sufficient to justify setting aside a judgment of affirmance, made because there was no appearance, or points or authorities on file, for defendant.

APPEAL from Superior Court, Santa Clara County; D. Belden, Judge.

This case was set for hearing at the January term, and, on being reached on the calendar, there was no appearance,

and no points or authorities on file, for appellant. The judgment of the lower court was affirmed. Subsequently, on motion, an order was made to show cause why the order of affirmance should not be set aside, and the accompanying affidavit was filed on the hearing of the order to show cause:

"I, W. S. Goodfellow, being duly sworn, depose and say as follows: I am the attorney for the appellants in this cause. On Thursday last the judgment and order appealed from were affirmed by this court, for the reason that there was no appearance by counsel for appellants, and no points and authorities on file. My failure to appear personally, or to file points and authorities, was due to the following causes: On the day on which this cause was reached on the calendar of this court I was engaged in the actual trial of a case in the superior court of Tulare county at Visalia, and had been so engaged all of that week. Moreover, I did not expect this cause to be reached on the calendar. When the calendar of this court in bank and in departments was published last January, I noticed that there were only three causes to which I would be required to give my personal attention—one in bank, one in Department 1 early in February, and this cause, which I found to be set for the last day of the session. The other cases I knew would be heard, and I made preparation, and argued them in due course. I felt almost certain that this cause would not be reached this session. Since 1880 this court has been so much overburdened with work, and with the hearing of cases of public importance, and the returning of prerogative writs, which are specially set and do not appear on the regular calendar, that, as I believe, neither department has hitherto been able to finish its regular calendar at the San Francisco session. I am told by a deputy in the clerk's office that this is the first occasion in his experience in which the court has been able to dispose of all the cases on the San Francisco calendar. As I have said, therefore, on reading the calendar in January I concluded that this case would not be reached, and I was afterward confirmed in that opinion when the order was made postponing all cases on the calendar two weeks. I would perhaps have noticed the progress the court was making had I not been absent in the country a considerable portion of the time. During the past five weeks I have

been absent attending to cases in four different counties outside of San Francisco, namely, in Contra Costa, Tuolumne, Santa Clara and Tulare. I was absent from San Francisco —on the trial of the case at Visalia, and afterward for one day attending to a case in Fresno,—from Saturday, the 3d day of March, until the afternoon of Saturday last, the 10th day of March; and on my return on the last-named day I discovered for the first time from the Law Journal that this case had been reached, and disposed of in my absence. The same afternoon I tried without success to find the presiding justice of this department, intending to make application for an order to show cause why the judgment should not be set aside. If I had not been absent in Tulare county, as above stated, I certainly would have been in attendance in the supreme court on the day this cause was reached. There is now, and for more than thirteen years there has been, published in this city a daily Law Journal in which appears the calendar of the day of every court of record holding court in this city and county. I have always been accustomed to rely upon the Law Journal for information as to what cases will be called for trial each day. I keep a diary of prospective events, but its chief purpose is to note the expiration of time to plead, etc. I sometimes, though not always, note upon that diary the dates of causes set for trial. [This cause was not noted on the diary.] I depend and have always depended upon the Law Journal to ascertain what causes are set for trial each day, and to protect me from allowing them to go by default. When cases are specially set, that fact also appears in the Law Journal. The calendar of this court, as a whole, was not published, as I believe, after January 23d, but there was published each day the list of cases to be heard on that day. My invariable practice is and has been to consult the Law Journal on my first arriving at the office in the morning. As an evidence that this system is sufficiently safe I may say, as the fact is, that in my experience of nearly thirteen years I have never omitted to be present in the supreme court when any case in which I was interested was called for hearing; nor, as far as I can remember, have I ever failed to be present on the trial of any cause in any of the other courts of record in this city and county. If I had not

been absent in Visalia I would have seen the calendar of this department for March 8th, which was duly published on that day, and I would, of course, have been in attendance. When I am absent I have some one to attend to my cases, of course, but for the reasons above stated I gave no directions as to this particular case. The clerk who was with me when the case was tried in the superior court, and who attended to preparing the appeal, left me nearly three years ago, and nothing has been done in connection with the case since. Although, therefore, the case appeared in the Law Journal of Thursday last, in my absence it was not recognized by anyone as a case in which the office was interested.

"I further depose and say that this appeal was taken and has been prosecuted in perfect good faith in the belief that the judgment of the court below is erroneous, and not in any degree for the purposes of delay, or from other unworthy motives. The amount involved is $2,000, with several years' interest. The action is upon a written contract for the payment of money upon certain contingencies, and the only question is whether upon facts almost undisputed the contingencies have happened or not. The judgment below was in favor of the plaintiffs. The defendants are fully solvent, and have, besides, given an adequate bond conditioned to stay execution. The defendants, as I believe, fully and fairly stated to me as their counsel the facts of the case. I also heard all the evidence given in open court. After such statement, and also after such hearing, I believe, and so advised them, and, so far as I can know, they each believe, that they had a good and sufficient defense to the action and grounds of appeal on the merits. I reside in the county of Alameda, and, so far as this is an affidavit of merits, or such affidavit as required, I make it on behalf of the defendants, for the reason that I do not know where at present they can be found. The transcript in this cause is not long, nor are the questions involved specially intricate. If the judgment herein be vacated I will be prepared to argue the cause orally at a moment's notice, or I can file a brief in five days' time, or even less, if time be material. I know no reason why the judgment entered on Thursday last cannot be vacated without prejudice or injury to the rights of the respondents or either of them.

"Subscribed and sworn to before me this 12th day of March, 1888."

The following order was then entered by the court: "Upon reading and filing the affidavit of W. S. Goodfellow in the above-entitled cause, it is ordered that the respondent show cause before this court, department No. 2, on the 22d day of March, 1888, at 10 o'clock in the forenoon of that day, why the order heretofore made affirming the judgment and order of the court below should not be vacated and set aside, and it is further ordered that a copy of said affidavit, and of this order, be served upon the attorney for the respondents five days before the said 22d day of March, 1888."

W. S. Goodfellow for appellants; S. F. Leibe for respondents.

Per CURIAM.—The showing made is not sufficient to justify the setting aside of the judgment of affirmance herein, and the motion is denied. So ordered.

COX v. McLAUGHLIN.

No. 12,220; May 1, 1888.

18 Pac. 111.

Bill of Exceptions—Necessary Contents.—Under Code of Civil Procedure of California, section 648, providing that, where an exception to a decision is on the ground of the insufficiency of the evidence to justify it, the objection must be stated, with so much of the evidence or other matter as is necessary to explain it, a bill of exceptions which merely sets forth the other findings of fact, and that such facts are established by the evidence, is not properly a bill of exceptions, stating evidence in compliance with above statute.

APPEAL from Superior Court, City and County of San Francisco; J. F. Sullivan, Judge.

Code of Civil Procedure of California, section 648, provides "that no particular form of exceptions is required; but when the exception is to the verdict or decision upon

the ground of the insufficiency of the evidence to justify it, ... the objection must be stated with so much of the evidence . . . . as is necessary to explain it, and no more. Only the substance of the reporter's notes of evidence shall be stated." Action by Jerome B. Cox against Kate D. McLaughlin, executrix of Charles McLaughlin, for services rendered and materials furnished in grading a railroad. Judgment for plaintiff. Plaintiff appeals.

D. M. Delmas and Henry E. Highton for appellant; Wilson & Wilson (L. D. McKisic of counsel) for respondent.

Per CURIAM.—This appeal is taken by the plaintiff from the judgment, which was in his favor; and the point is made that a portion of one finding is not sustained by the evidence. The judgment must be affirmed, so far as this appeal is concerned—First, because, if we can take the facts stated in the bill of exceptions as the evidence, it fully sustains the finding; and, second, waiving the objections that the appeal was not taken in time, there is no bill of exceptions stating the evidence. The bill of exceptions merely sets forth other findings; proceeds to state that such facts were established by the evidence. This is not a statement of so much of the evidence as may be necessary to explain the point made. It is not a statement of evidence at all, but a general conclusion that certain facts were established by the evidence. This is not a compliance with the statute. It is really an effort to array one portion of the finding against another. The judgment is affirmed, subject to the appeal on the part of defendant.

McDONALD v. HUFF.*

No. 11,064; May 19, 1888.

18 Pac. 243.

Vendor and Vendee—Delivery of Deed.—A Mortgagor Agreed in writing to execute a deed to the mortgagee, and leave it in escrow, to be delivered upon default by him in paying an agreed sum less than the amount due, provided the mortgagee gave a receipt in full. The deed was accordingly left as an escrow. Default was made, but, before the mortgagee accepted the deed, the mortgagor demanded it back, and conveyed to another. Held that, as the mortgagee had not signed the agreement, and therefore could never have been compelled to accept the deed, the mortgagor was at liberty to withdraw it at any time before it was accepted; nor did the contract become an executed one from the mere fact that the mortgagee forbore suit upon the mortgage until it was barred by the statute of limitations.

Mortgage.—A Deed Left by a Mortgagor as an Escrow, to be delivered upon default in payment by him of a sum fixed upon in satisfaction of all indebtedness, does not become operative until default, and creates no lien on the land.

APPEAL from Superior Court, Humboldt County; J. P. Haynes, Judge.

Action to quiet title, brought by John E. McDonald against John Huff and R. F. Herrick. Judgment for plaintiff, and defendants appeal.

S. O. Houghton (Archer & Bowden of counsel) for appellants; S. M. Buck for respondent.

TEMPLE, J.—In 1882, plaintiff had a judgment against the defendant Huff, and also held a note given by him, secured by a mortgage. He threatened to foreclose the mortgage, and finally agreed with Huff that Huff should convey to plaintiff the mortgaged premises, in consideration whereof the plaintiff would release Huff from all the indebtedness. The agreement was reduced to writing, and is signed by Huff only. In it Huff recites his indebtedness of three thousand five hundred dollars on the mortgage and

*For subsequent opinion in bank, see 77 Cal. 279, 19 Pac. 499.

six hundred dollars on the judgment, and then proceeds as follows: "And whereas, I am at present unable to pay said sums at present, in full, in cash, but am desirous to satisfy said demands; and whereas, the said John E. McDonald is willing that I should make to him a conveyance of the land described in said deed, and in consideration of said conveyance release and discharge me from all of said indebtedness, and from all indebtedness due and owing from me to him; and whereas, the said John E. McDonald is also willing that I should retain said land, and that said deed of conveyance be held in escrow by R. H. McDonald, of the Pacific Bank, of San Francisco, Cal., until November 21, 1882, and that in case I pay to said John E. McDonald on or before said November 21, 1882, the sum of three thousand and eighty ($3,080) dollars, then the said deed is to be redelivered to me, and the said John E. McDonald give me a receipt in full of all demands against me, and said deed to be of no force or effect, and convey no title to said John E. McDonald. Now, then, I direct that said R. H. McDonald, with whom said deed is deposited, hold the same in escrow until the 21st of November, 1882, and in case I pay to said John E. McDonald or any agent or assign of him, said sum of $3,080 on or before said November 21, 1882, then the said R. H. McDonald redeliver and return to me said deed. And in case I fail to make payment to said John E. McDonald, or his agents or assigns, of said sum of $3,080 on or before November 21, 1882, then the said R. H. McDonald is hereby authorized to deliver to said John E. McDonald the said deed of conveyance on the said John E. McDonald executing to me a receipt in full of all demands against me by him and depositing the same with the said R. H. McDonald to be delivered to me by the said R. H. McDonald." On the same day Huff executed the deed and deposited it with R. H. McDonald. McDonald executed no instrument in writing obligatory in himself to accept the deed and release the debt, nor did he bind himself not to bring suit to foreclose. In fact, however, he did not foreclose, but acquiesced in the agreement. Huff did not pay the three thousand and eighty dollars, or any portion of it, on the 21st of November, or at any time, nor did McDonald execute the receipt or demand his deed. The deed still remained with R. H. McDonald un-

til the sixteenth day of March, 1883, when it was delivered to plaintiff's attorney for plaintiff, the attorney executing a receipt in full of all demands against said Huff, which was left with R. H. McDonald for Huff. It is not found that the attorney had any authority from John E. McDonald to give the receipt or to accept the deed. Prior to the delivery of the deed, however, to wit, on the 21st of February, 1883, Huff demanded of R. H. McDonald that he surrender and deliver up to him, Huff, the deed that had been left in escrow, and the agreement or instructions accompanying it, which demand not being complied with, Huff gave notice in writing to R. H. McDonald, February 28th, of his withdrawal of said instrument and conveyance. Huff also conveyed the land to defendant Herrick for an expressed consideration of five thousand dollars, which deed was duly recorded before R. H. McDonald delivered the first deed. Herrick, it is found, however, took with full knowledge of all the facts.

This action is brought to have the deed to Herrick canceled, and to quiet plaintiff's title. By the terms of the contract of escrow the deed was not to become operative until Huff had made default in paying the three thousand and eighty dollars and McDonald had executed a receipt in full of all demands against Huff. And if no such default were made, the deed was not to become operative at all. This is the rule generally in regard to instruments placed in escrow. It could not operate then to create a lien upon the land, and we do not see how any question can arise upon the claim that as a mortgage it is void because providing for a forfeiture without foreclosure. Nor can it be held, as respondent claims, that when Huff failed to pay, R. H. McDonald held the deed as agent for plaintiff. Plaintiff had not bound himself to forbear suit, to remit a portion of the debt, or to accept the deed in payment. Until he did the latter by executing a release and delivering it he was not entitled to the deed. The contract was a conditional sale of land in consideration of an existing indebtedness, with the privilege on the part of the vendor to satisfy the indebtedness within a stated period, in which event the contract of sale would be void. There is no question of the statute of frauds as to the vendor, as his contract was in writing. But it is a serious question as to whether the purchaser was bound. He verbally agreed to give further time on his

indebtedness, and to accept a sum less than the amount due, in full satisfaction of his debt. This undertaking was not in writing, and not a contract which varied the terms of his written agreement. Evidently he was not bound by it, but might have brought suit to foreclose at any time, notwithstanding the agreement. Nor do we think it can be held that it became an executed contract, from the mere fact that the plaintiff did forbear to bring suit until the lien of the mortgage was lost by reason of the statute of limitations. The indebtedness was not barred. The contract signed by Huff was a new promise. The plaintiff, even after the 21st of November, when the privilege of the vendor to pay had expired, could not have been compelled to accept the deed and release all the indebtedness of Huff to him. That being the case, we think Huff was at liberty to withdraw his deed from escrow at any time before it had been accepted by the plaintiff.

It follows that the judgment must be reversed, and it is so ordered.

We concur: Paterson, J.; McKinstry, J.; Searls, C. J.

MORGANS v. ADEL.

No. 11,155; May 19, 1888.

18 Pac. 247.

Evidence—Account-books—Partnership.—In an action to recover money due on contract, where one furnishes material and another does work under an agreement to divide the profits, the original books of entry of the parties are proper evidence to show the amount of work done.[1]

Appeal—Conflicting Evidence.—On a Trial to the Court the finding will not be disturbed where the evidence is conflicting.

APPEAL from Superior Court, Santa Clara County; F. E. Spencer, Judge.

[1] Cited in a note in 138 Am. St. Rep. 471, on account-books as evidence.

Action by C. H. Morgans against William T. Adel to recover money due on contract, under the following state of facts. Defendant, being engaged in the business of carriage-making, in all its branches, and having a paint-shop in connection with said business, employed plaintiff to paint vehicles upon mutual agreement between them that defendant build, furnish all the materials, shop utensils, and appliances, and collect all sums due for painting from customers, and the plaintiff should perform all the labors in and about painting all the vehicles and usual work that would be brought into a carriage-shop; that, as compensation for his labor, and that of any and all employees in and about such painting, it was agreed that the plaintiff should receive from the defendant from time to time a share or portion of sums charged by defendant to customers for said work sent them, to be thereafter agreed upon, and to be a just proportion of the whole price charged.

J. B. Lamar and W. B. Hardy for appellant; C. D. Wright and John Reynolds for respondent.

FOOTE, C.—This is an action for work and labor performed by the plaintiff as a painter for the defendant. Upon a cross-complaint the court below rendered judgment for the defendant, which, upon motion being made for a new trial, was modified in favor of the plaintiff to the extent of lessening the sum of money for which the original judgment was given, and, the defendant agreeing to the reduction thus made, the motion for new trial was refused. From the judgment and order this appeal is prosecuted.

It is claimed that the court erred in finding that there was a special agreement between the parties as to the manner and amount of plaintiff's compensation. There was a very decided conflict of evidence upon the point, and it is evident from the record that the very experienced judge who tried the cause had a better opportunity than we can have to determine upon which side preponderated the weight of testimony; hence his findings should not be disturbed. The objections to the introduction in evidence of the two books, entitled "Paint-shop Book, 1882," and "Paint-shop, 1883," and of Exhibit

A of the defendant, at folio 104 of the transcript, are untenable. They were original books of entry of the parties, and shed light upon the question as to what charges were made, the work performed by plaintiff, and the amount thereof, so that there might be ascertained what was his fair proportion or percentage for his labor. We perceive no error in the record, and advise that the judgment and order be affirmed.

We concur: Belcher, C. C.; Hayne, C.

Per CURIAM.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

GREGORY v. KEATING et al.

No. 12,472; May 22, 1888.

18 Pac. 389.

Appeal—Dismissal.—From a Decree of Foreclosure defendants appealed. Respondent moved to dismiss the appeal, and in support thereof filed affidavits as follows: That appellants had threatened, in case of foreclosure sale, to resist the issuing of a writ of assistance to place the purchaser in possession thereof; that the property was insufficient security for the debt, its value decreasing, with danger, by reason of noninsurance, of further loss; that appellants were insolvent, and had stated their appeal to be for purposes of delay and vexation; that the amount of the undertaking on the appeal was insufficient to cover the probable deficiency that would arise from the foreclosure sale, and was fixed by a judge other than that of the trial court, in chambers, without notice to or knowledge of respondents; that the trial court refused to set aside said undertaking, or increase the amount thereof, because the supreme court alone had jurisdiction after the appeal was taken; and that appellants had deposited no money in court to perfect their appeal. Held, that this showing was insufficient to support such motion.

Appeal—Issue of Execution Pending Appeal.—In such case the facts alleged are insufficient to support a motion to issue an execution or grant an order of sale pending the appeal.

Appeal—Motion to Advance Hearing.—In such case a motion to advance the hearing of the cause will be denied.

APPEAL from Superior Court, City and County of San Francisco; E. B. Mahon, Judge.

Motions by respondents to dismiss appeal, advance cause for hearing, and to direct court below to issue execution or to order a sale of the property in controversy. In support of the motions respondents filed two affidavits, which were as follows:

"James B. Gregory, being duly sworn, deposes as follows: I am the plaintiff and respondent in the above-entitled action. I reside in Scotland, and was residing there at the time of the commencement of the said action. By advice of my counsel, I came to San Francisco in December, 1886, to attend as a witness on the trial of said action. I am advised by my said counsel that it would not be prudent for me to be absent from the state of California in case the mortgaged property described in my complaint in said action should be sold to me under foreclosure, for the reason that the defendant Mary Jane Keating has threatened that she will resist any application that shall be made for a writ of assistance to place the purchaser into possession, and that in such case my presence and testimony would be necessary for the protection of my rights or the rights of any such purchaser against such opposition on the part of said Mary Jane Keating. There is now due to me on the judgment of foreclosure in said action the sum of $12,822, with interest thereon from February 21, 1887, besides $107, costs, and $500, allowed for counsel fees. The only security which I have for the payment of said debt consists of a leasehold interest in the land described in said complaint, and of the buildings thereon. The value of said security does not now exceed $12,000, and the value thereof diminishes from day to day as the lease under which the same are held will expire on the 1st day of June, 1893, and for the further reason that the said defendants neglect to keep the said buildings in repair, and refuse to insure the same for my benefit against loss by fire. The defendant Denis Keating has threatened and declared that he will hold possession of the said leasehold premises until the expiration of the term of the said lease, and, for the purpose of such delay and vexatious hindrance, he has taken an appeal from the said

judgment, the transcript on said appeal being filed with the clerk of this honorable court on the —— day of December, 1887, to which reference is hereby made. The defendants have no property, and neither of them has any property other than the leasehold interest aforesaid. The sum of $3,300, specified in the undertaking on appeal set forth in said transcript, is totally inadequate to secure the payment of the deficiency arising, or that may arise, upon the sale under the said judgment. The said cause was tried by the Honorable James G. Maguire, judge of the superior court of the state of California, in and for said city and county, and the said amount was fixed for the stay of execution on said judgment by order of the Honorable E. B. Mahon, judge of the superior court of Marin county, made by him at chambers, and not in open court; that the said order was made without notice to me or to my attorney. After the notice of appeal was given, and undertaking on appeal was filed, in said action in the court below, I made a motion for an order to set aside the said order, and to set aside the undertaking given in pursuance thereof, and for the issuance of an order of sale pursuant to said judgment, on the ground that the said undertaking is insufficient for stay of execution on said judgment; that the amount fixed as aforesaid for such stay was inadequate, and on the ground that the said judge who made the said order fixing the said amount had no jurisdiction, and on the ground that the said order was made without notice to me or to my attorney. The said motion was heard in open court by the said Hon. James G. Maguire, the judge thereof, after due notice given to the attorney for the defendants, but was denied upon the sole ground that the said superior court had no jurisdiction of the matter after an appeal had been taken to the supreme court, and that my only remedy would be recourse to the supreme court.

"JAMES B. GREGORY.

"Subscribed and sworn to before me, January 6, 1888.

"CHAS. T. STANLEY,

"Notary Public."

"Alexander H. Loughborough, being duly sworn, deposes and says that he is the attorney for the respondent in the above-entitled action; that the said respondent has never

waived the undertaking required for the perfection of the appeals, or any of them, in said action; that the appellants have not, and that neither of them has, made any deposit of money in court for the perfection of the appeals, or either of them, in said action; and that the said appellants have not, and that neither of them has, given or filed any undertaking or appeal further or other than appears in the transcript of appeal in said action filed in this court. And this deponent further says that the order fixing the amount of the undertaking set forth at folios 393 and 394 of the said transcript was made without notice to this affiant, and that the same was not made by the judge of the court which rendered the final judgment in that action, but was made at chambers by Hon. E. B. Mahon, who was then judge of the superior court of Marin county; that this affiant, upon behalf of the respondent, and upon due notice to the appellants, and upon affidavits showing the inadequacy of the amount fixed by the said order, moved the superior court of the city and county of San Francisco, department four, the Honorable James G. Maguire presiding, on the 30th day of November, 1887, for an order setting aside the aforesaid order made at chambers by the said Judge Mahon, and to increase the amount required for the stay of execution; but the said motion was denied solely upon the ground that the superior court had no jurisdiction to grant such motion, and that such relief could be granted only by the honorable the supreme court of the state of California.

"A. H. LOUGHBOROUGH.

"Subscribed and sworn to before me this 27th day of January, A. D. 1888.

"CHAS. T. STANLEY,
"Notary Public."

Michael Mullany for appellants; A. H. Loughborough (Carter P. Pomeroy of counsel) for respondent.

Per CURIAM.—The motions of respondent herein to dismiss the appeals of the appellants, and to advance the hearing of the cause, and to direct the court below to issue an execution or order of sale are hereby denied.

PARDY v. MONTGOMERY et al.

No. 11,204; May 25, 1888.

18 Pac. 330.

Dismissal of Action for Want of Prosecution.—A case was tried before the court, who announced that his opinion was for defendants, but notice of decision was not given, or finding of facts filed or waived. After some delay, plaintiff applied to the clerk to enter judgment, that he might appeal, and, being refused, moved for a new trial, which motion was dismissed, whereupon he moved to place the case on the calendar for trial, pending which defendants moved to dismiss the case for want of prosecution. Held, not a proper case for dismissal.

APPEAL from Superior Court, City and County of San Francisco; John F. Finn, Judge.

Action by George Pardy against Charles Montgomery, George S. Montgomery, John F. Geary and Isaac Barker. On motion of defendants the action was dismissed for want of prosecution, and plaintiff appealed.

W. T. Baggett and Sam. T. Birdsall for appellant; W. S. Goodfellow for respondents.

FOOTE, C.—This is an appeal from a judgment dismissing a cause for the want of prosecution. From the affidavits in the transcript, which are mutually agreed, by the joint certificate of counsel on both sides, to have been those used on the hearing of the notice, it is apparent that the cause was tried before Judge Allen, but that no findings were ever waived or filed; that after some delay the plaintiff, against whom the judge announced that he should give judgment, endeavored to have the judgment entered, that an appeal might be taken; that the clerk of the court very properly refused to do so; that afterward, upon the substitution of an attorney for the defendant, a motion for a new trial which had been made was dismissed, which was followed by a motion to reinstate the case upon the calendar for trial, to which the defendant responded by a counter-motion to dismiss for the want of prosecution—no notice of decision ever having been

given. This last motion was granted. As it seems to us, the failure of the defendants to file findings or have them waived, or to give any notice of decision, does not place them in a position to have dismissed, for the want of prosecution, a case which the plaintiff is clamorous to try. The fact that defendants, by neglect to take care of their rights, have occasioned the loss of important testimony, is not chargeable to the plaintiff, and there is nothing to show that the plaintiff or his several attorneys have purposely misled the defendants or their attorneys to their prejudice. There is nothing in the record which shows any merit in the defendant's contention that the action was properly dismissed for the want of prosecution, and we advise that the judgment be reversed.

We concur: Belcher, C. C.; Hayne, C.

Per CURIAM.—For the reasons given in the foregoing opinion the judgment is reversed.

STRAUS v. WILLIAMSON et al.

No. 12,483; June 1, 1888.

18 Pac. 432.

Appeal—Conflicting Evidence.—In an Action to Amend a Mortgage on the ground of mistake, and to foreclose the mortgage as amended, a judgment for defendant upon a finding that no mistake occurred, will not be disturbed on the ground that the evidence did not support the finding when the evidence on the material points of the case is conflicting.

APPEAL from Superior Court, San Luis Obispo County; D. S. Gregory, Judge.

Action, by J. Straus against A. Williamson and J. H. Orcutt, to have the description in a mortgage made by defendant Williamson reformed so as to embrace property other than that described in the mortgage, on the ground of mistake, and, when so reformed, to foreclose the same. The defendant

Orcutt was made a party because he was a grantee of the land intended to be described in the mortgage, subsequent to its making. Judgment went for plaintiff, against Williamson, for the money secured by the mortgage; but the court below refused to reform the mortgage, and found against plaintiff as to the alleged mistake. From this judgment, and an order refusing him a new trial, plaintiff appealed.

J. M. Wilcoxon for appellant; W. H. Spencer and V. A. Gregg for respondents.

Per CURIAM.—The contention of appellant in this case is that the evidence is insufficient to justify the decision. We find, on an examination of the record, that the evidence is conflicting on the material points, and therefore the judgment and order must be affirmed. So ordered.

RYAN v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

No. 12,568; June 1, 1888.

18 Pac. 598.

Writ of Review.—Where a Judgment has Been Entered for Defendant, and, on plaintiff's motion, the court vacates the judgment, and restores the case to the calendar for a new trial, a writ of review by the supreme court will not lie to a subsequent order, made on defendant's motion, setting aside the former order, and refusing a new trial.

Upon a petition for writ of review.

The facts as shown by plaintiff's petition, are as follows: Mary Ryan, the petitioner, says that she is the party beneficially interested herein, and plaintiff in the cause of Mary Ryan v. C. P. Kennedy and Mary A. Kennedy, Executor and Executrix of Philip Kennedy, Deceased; that said cause was commenced in the justice's court of the city and county of San Francisco on September 17, 1887, and was brought for the recovery of one hundred and two dollars, money loaned to Philip Kennedy, defendants' testator; that on October

21, 1887, defendants having answered, the cause was tried before J. D. Page, presiding justice of said court, and judgment entered in favor of plaintiff for one hundred and two dollars principal, five dollars and ten cents percentage, and ten dollars costs; that defendants appealed to the superior court of the city and county of San Francisco, from the said judgment, on questions of law and fact, and the cause was assigned to F. W. Lawlor, presiding judge of Department No. 8 of said court; that, on motion of plaintiff, the cause was set for trial on January 9, 1888, and was tried on that day by said Lawlor, and an oral decision given in favor of defendants, plaintiff demanding findings; that on or before January 17, 1888, judgment without findings was entered in favor of defendants, at the written request of their attorney; that on January 20, 1888, notice was given and filed that on January 27th following plaintiff would move the court to set aside the judgment entered against her (on the ground that the same was ineffectual and void because there were no findings to sustain it), and to restore the cause to the calendar, and set a day for trial thereof, at which time the motion was heard, and an order entered vacating said judgment, and restoring the cause to the calendar for trial on March 6, 1888; that on February 3, 1888, on motion of defendants, an order was entered by the court, setting aside that portion of its order of January 4, 1888, which restored the cause for trial; that plaintiff excepted to said last order, which as she is informed and believes, is in excess of the jurisdiction of the court granting it; that affiant is informed that she has no right of appeal, nor any remedy other than by her present proceeding. Wherefore she prays the supreme court that respondent, the said Lawlor, J., be directed to certify and send up, for review by said supreme court, a transcript of the record and proceedings in said cause, and that meanwhile execution for defendants' costs be stayed.

James Gartlan for petitioner; Charles F. Hanlon for respondent.

Per CURIAM.—We have examined the petition on this application for a writ of review, and can find no reason why the writ should issue. The application is therefore denied. Ordered accordingly.

WALLACE v. HOPKINS.

No. 11,226; June 13, 1888.

18 Pac. 673.

Brokers—Sale of Mining Stock—Commissions.—The plaintiff and defendant entered into a written agreement that if plaintiff should succeed in selling certain mining stock in defendant's possession, that plaintiff should receive all defendant's stock at twenty cents per share, and the shares held for third persons at fifty cents per share. Plaintiff then went to T., one of the stockholders, and by inducing him to believe that all the stockholders had agreed to take twenty cents per share for their stock, procured an order on defendant authorizing him to sell all T.'s stock at twenty cents per share, and deposited the said order with defendant. The next day T. revoked the order, but plaintiff received no notice thereof, and sold the mine at the price agreed on between himself and defendant. Defendant received all the money paid by the persons to whom plaintiff sold, and paid T. fifty cents per share for his stock. Plaintiff sued defendant for the difference between the price of the stock at twenty cents and fifty cents per share. Held, that defendant was not liable, not having received any money from the sale of the stock for the use of plaintiff.

APPEAL from Superior Court, City and County of San Francisco.

The plaintiff, Thomas Wallace, alleges that on or about the eighth day of March, 1879, at San Francisco, the defendant, William S. Hopkins, received fourteen hundred and fifty dollars from the sale of stock in the "Niagara G. & S. Mg. Co.," to be paid to and for the use of the plaintiff; that the defendant, although often requested, has not paid any part thereof to the plaintiff; and judgment is asked for that sum, with interest from that day. The answer denies these statements. The evidence establishes, without any conflict, that on the twenty-eighth day of February, 1879, the defendant had in his possession fifty-seven thousand five hundred and ninety-five shares of the stock of said company, of which four thousand nine hundred shares belonged to William R. Townsend. A portion belonged to the defendant, and the remainder was owned by other persons. On that day Townsend gave the plaintiff an order, directed to the defendant, read-

ing as follows: "You are hereby authorized to sell the 5,000 shares Niagara stock, more or less, in your hands, belonging to me, for the sum of one thousand dollars, gold coin. This to hold good for fifteen days from date"—which writing the plaintiff on that day delivered to the defendant, who wrote at the bottom of it the following, in red ink: "[Four thousand nine hundred shares belonging to W. R. Townsend, 225 shares having been delivered to his client. 2-28-79. Wm. S. Hopkins.]" On the same day the defendant delivered all the shares of stock, in an envelope, to the cashier of Donohoe, Kelly & Co.'s Bank, at San Francisco, and instructed the cashier to deliver the package containing the stock to the plaintiff, or his order, in New York, upon payment of $15,446. The stock was accordingly forwarded to Eugene Kelly & Co., New York city. The plaintiff started for New York March 1, 1879, arrived there the 8th of that month, and on the 10th of that month the plaintiff effected a sale of all of the stock, Israel S. Blumenburg paying Eugene Kelly & Co. on that day the said fifteen thousand four hundred and forty-six dollars; and the money was telegraphed out to San Francisco the same day. In that sale the four thousand nine hundred shares brought two thousand four hundred and fifty dollars, being part of the fifteen thousand four hundred and forty-six dollars, all of which money was received by the defendant on that day; and it is the difference between that two thousand four hundred and fifty dollars and one thousand dollars, which the plaintiff claims Townsend was to have for the four thousand nine hundred shares of stock, that the plaintiff seeks to recover in this action. The plaintiff testified that he agreed with Townsend to pay him one thousand dollars on or before the fifteenth day of March, 1879, for the four thousand nine hundred shares of stock; that Townsend agreed to the sale, and gave to the plaintiff that order upon the defendant to deliver the stock to the plaintiff upon the payment of one thousand dollars; that the plaintiff received this order on the twenty-eighth day of February, 1879; that he took the order to the defendant on the same day; and then stated to him that he had purchased this stock from Townsend; that the understanding between the plaintiff and defendant then was that the plaintiff should pay the defendant, on account of Townsend, one thousand dollars for that

stock, and that the defendant should hold the balance the stock might bring to plaintiff's credit, provided the plaintiff made the payment on or before March 15, 1879, according to the order; that the defendant said he was very glad that the plaintiff had made that purchase; that he would feel more interest in making sale of the whole parcel of stock; that the defendant then agreed, if the plaintiff went east, to sell the whole stock, and succeeded in so doing, the whole money should be sent to the defendant, and that the money received for the four thousand nine hundred shares should be disposed of by the defendant by paying Townsend the one thousand dollars, and retaining the balance for the plaintiff; that the plaintiff agreed with Townsend to pay him the one thousand dollars out of the proceeds of the sale of the stock; that the plaintiff left New York on the next day, March 1, 1879, to effect a sale of the whole stock; that the plaintiff demanded the fourteen hundred and fifty dollars of the defendant several times before bringing this suit, and after the defendant had admitted to the plaintiff the receipt of the money; that the reason the fourteen hundred and fifty dollars was not deducted out in New York was because the defendant held the whole stock in trust for the parties interested in the pool, and the collection was made as an entirety; that the plaintiff's object in going east was to insure the sale of the stock, because he had an interest of fourteen hundred and fifty dollars in the success of the sale; that Townsend and the defendant understood that the plaintiff was going to New York to effect the sale; that the only interest the plaintiff had in the whole stock, or making the sale, was the four thousand nine hundred shares, which he thus purchased. The defendant testified that it is likely he wrote the red-ink portion on the order, in presence of the plaintiff, to show him just how many shares Townsend had in his possession; that when the plaintiff delivered this written order to him, the plaintiff expressed a desire that when the money was paid over, the defendant should retain the difference between the one thousand dollars and the two thousand four hundred and fifty dollars, and wished the defendant to place the difference to the plaintiff's credit, and pay it over to him; that it was a question in his mind, and so he stated to him, if it was the right or proper thing for him to do; that he had no understanding or agreement with the

plaintiff with reference to the Townsend stock and money other than that whoever the money belonged to he was willing to pay it to; but that he did not recognize Mr. Townsend's order on him to accept the one thousand dollars. W. R. Townsend testified that the substance of the conversation between the plaintiff and himself, at the time he signed the writing above mentioned, was that the plaintiff stated he was going east to effect a sale of the Niagara stock which the defendant held in the pool for the different stockholders. That his understanding from the plaintiff was that the other stockholders would accept twenty cents a share. That plaintiff wanted to know whether he would go in with the rest. That he told him he would do whatever the rest did. He would not swear that the plaintiff told him that the other parties had authorized Hopkins to sell the stock for twenty cents a share. That was his understanding. For that reason he gave him the writing. That the next day he saw one of the stockholders, who told him he had not agreed to sell at that price. That he revoked the letter to Hopkins as soon as he could find him. That the plaintiff told him he was going east to sell the stock, and he wanted him to allow his stock to be sold for one thousand dollars. That he understood the plaintiff to have the option on all the stock at rate of twenty cents a share. And he says: "I wrote that note to Hopkins, authorizing him to accept one thousand dollars, which would be twenty cents a share on my stock." That he did not notify the plaintiff that he had revoked the authority which he had given the defendant to sell.

The court found the following facts: "(1) That on the twenty-eighth day of February, 1879, the defendant had in his possession upward of fifty thousand shares of the capital stock of a corporation called the 'Niagara Gold & Silver Mining Company.' A portion of said stock was owned by said defendant, and a portion thereof was owned by other persons. Defendant had authority from the owners of said stock to sell the same at fifty cents per share. Among the stock so held by him were four thousand nine hundred shares belonging to and the property of one Wm. R. Townsend. Said Townsend had previously authorized said defendant to sell said stock for fifty cents a share. On said twenty-eighth day of February, 1879, said plaintiff and said defendant made

an agreement by which the said defendant gave the plaintiff the privilege to purchase all said stock held by said defendant on or before the fifteenth day of March, 1879, at the following rates, to wit: Twenty cents a share for the stock owned by defendant, and fifty cents a share for the stock held by defendant, but owned by other parties. This agreement included the four thousand nine hundred shares of stock owned by said Townsend. After the agreement was made, and on said twenty-eighth day of February, 1879, the said plaintiff had an interview with said Townsend, in which the said Townsend understood that all the stockholders owning said stock held by said defendant, as aforesaid, had authorized the sale of the same at twenty cents a share. Thereupon, and with that understanding, Townsend wrote a note to said defendant authorizing him to sell his [Townsend's] stock at one thousand dollars, which note was delivered to said Wallace by Townsend, and by Wallace delivered to defendant. Afterward, and on the same day, Townsend called on defendant, and from him learned that the other stockholders having stock in defendant's hands had not authorized the sale of their stock at twenty cents a share, or at any price less than fifty cents per share. Thereupon Townsend revoked and countermanded his said authority to defendant to sell said stock at twenty cents a share, but left defendant with authority to sell it at fifty cents a share. Plaintiff was not advised of this action on Townsend's part, but went immediately to New York and effected a sale of all said stock at the prices before mentioned, to wit, twenty cents a share for defendant's stock, and fifty cents a share for all the other stock held by defendant, including Townsend's said stock. And the said purchase price was paid over to said defendant within said fifteen days after said twenty-eighth day of February, 1879. On receipt of the money, defendant paid Townsend fifty cents a share for his stock. The money claimed by plaintiff is the difference between one thousand dollars and the fifty cents a share of this four thousand nine hundred shares of Townsend's stock. (2) The defendant did not receive the sum of fourteen hundred and fifty dollars from the sale of the capital stock of the Niagara Gold & Silver Mining Company on the eighth day of March, 1879, to be paid to or for the use of the plaintiff, nor did defendant receive any money from the sale

of said stock for the use of the plaintiff, and the allegation of the complaint in that behalf is not true. (3) The defendant has not paid the sum of fourteen hundred and fifty dollars to plaintiff, or any part of it." The court gave judgment for the defendant for costs. The plaintiff appeals from the judgment and the order denying his motion for a new trial.

William H. Hart for appellant; Daniel Titus for respondent.

FOOTE, C.—This action was brought to recover a sum of money alleged to be due the plaintiff from the defendant. The court below gave judgment in favor of the defendant, and from that and an order denying a new trial the plaintiff has appealed. In his statement, on motion for a new trial, he specifies particulars in which the evidence is alleged to be insufficient to support findings 1 and 2 of the decision; and his main contention here seems to be that the trial court made those findings against the evidence given on the trial. We have carefully examined all the evidence in the record, and are of the opinion that the court below was fully justified in finding as it did, and, no prejudicial error appearing, we advise that the judgment and order be affirmed.

We concur: Belcher, C. C.; Hayne, C.

Per CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

PEOPLE v. BOWERS.*

No. 20,345; June 14, 1888.

18 Pac. 660.

Courts—Appellate Jurisdiction of Supreme Court in Criminal Cases.—The supreme court, under the constitution of California, article 6, section 4, has appellate jurisdiction, in criminal cases prosecuted by indictment in a court of record, in questions of law only, and cannot set a verdict aside where the evidence is conflicting.

*For subsequent opinion in bank, see 74 Cal. 415, 24 Pac. 752.

Homicide—Evidence.—Where a Druggist Testifies That He had Sold Defendant, a Physician, who is on trial for murdering his wife by poisoning with phosphorus, medicine during the illness of his wife, and says he would not put up phosphorus in overdoses for anyone but a physician, and is asked if he would then, and answers, not until he had spoken to the physician, the answer cannot prejudice defendant, as it is not proof of a general custom, nor is it claimed that he had sold phosphorus to defendant.

Homicide—Order of Testimony.—It is not Error to allow a witness for the prosecution to testify after defendant has opened his case, when the reasons given by the court for so doing show there has been no abuse of the discretion given by Penal Code, section 1094.

Homicide—Examination of Experts.—In a Trial for Murder, Where the State claims the death was caused by poisoning, it is admissible to ask expert witnesses the cause of the death, when there is some evidence to support the facts hypothetically stated in the questions.[1]

Homicide.—It is Proper to Propound a Hypothetical Question to an Expert, based on any facts of which there is evidence, though the weight of evidence may be strongly against the truth of the facts assumed, and it is for the jury to disregard the opinion if the evidence fails to establish the facts thus assumed.

Witness—Questions by the Court.—It being in the discretion of the court to permit leading questions, it may, of its own motion, ask questions of witnesses in that form.

Homicide—Objection to Evidence.—Where the Stomach and Intestines of Deceased are set aside for analysis, but not sealed, and the physician who had them in charge is certain they have not been tampered with, it is for the jury to decide whether there is a doubt as to that fact; and an objection to the sufficiency of the identification, not made until after the testimony for the people is all in, comes too late.

Criminal Trial—Examination of Defendant.—To ask defendant, on cross-examination, the name of his father and mother, cannot prejudice him.

Criminal Trial—Conduct of Prosecuting Attorney.—Where the prosecuting attorney proposed to read to the jury in his argument a paper not in evidence, and stated that it purported to be the record of defendant as furnished by a chief of police, while his course is reprehensible, it does not prejudice defendant when it is promptly

[1] **Cited** in People v. Sampo, 17 Cal. App. 150, 118 Pac. 963, where the court say that a physician might testify that "the wound could have been inflicted by means of said rock," the witness not being asked to testify as to who inflicted the wound nor whether it was caused by the rock exhibited to the jury.

rebuked by the court, who charges the jury that statements of counsel not in proof are not evidence, and to be disregarded.

Criminal Trial.—Where the Court, After Charging in Strong Language as to the Presumptions surrounding defendant, and the certainty of proof required, calls the jury's attention to the fact that the law should be fearlessly administered, and that, if they were satisfied beyond a reasonable doubt of defendant's guilt, they should be derelict in duty if they failed to find so, it is not prejudicial, though not in good taste.

Homicide.—Where, After Defendant Appeals from a Conviction for Murder, a third person confesses that he committed the crime, and that defendant is innocent, these matters not being in the record, and there being no law by which they can be for the first time presented to the supreme court, cannot be considered by it.

Witness—Credibility.—A Witness cannot be Asked, on Cross-examination, whether she is not in the habit of playing cards for money, and asking for money from her daughter for that purpose, under Code of Civil Procedure, section 2051, providing that evidence of a particular wrongful act is not admissible to impeach a witness.

APPEAL from Superior Court, City and County of San Francisco; D. J. Murphy, Judge.

J. Milton Bowers was indicted for the murder of his wife. The court, after the case for the prosecution had closed, and the defendant's case had begun, permitted a witness for the prosecution to be called under Penal Code of California, section 1094, which provides that, for good reason, the court, in its discretion, may change the order of trial as provided by the statute. Defendant was convicted, and sentenced to be hanged, and appeals.

Charles N. Fox and Colin Campbell for appellant; George A. Johnson, attorney general, for the state.

PATERSON, J.—On August 24, 1885, Mrs. Cecelia Bowers, wife of defendant, Dr. Bowers, became very ill with what appeared to be a bilious colic. On the following day, and later, physicians were called in, and, after making a diagnosis of the case, all pronounced it to be "abscess of the liver." She was treated accordingly by the attendant physicians, but continued to suffer great pain in the right side, and to vomit and discharge large quantities of pus and bile until her death,

which occurred November 1st following. On November 3d the coroner of the city and county of San Francisco received an anonymous communication which stated that there was reason to believe there had been foul play in the treatment of Mrs. Bowers during her last illness, and requesting an official investigation. The coroner proceeded to the house of defendant, where preparations were being made for the funeral, summoned a jury, and held an inquest. He then postponed the investigation until after the funeral, upon a promise made by those in charge of the funeral that the remains would not be interred, but would be placed in a vault, and returned to the morgue for the autopsy. Owing to a misunderstanding, the remains were interred at the conclusion of the funeral services on that day, November 3d. On the morning of November 5th the coroner discovered the mistake which had been made, disinterred the remains, and held the autopsy. On December 30, 1885, an information was filed, charging the defendant with having willfully, unlawfully, and of his malice aforethought killed said Cecelia Bowers; and on April 23, 1886, he was convicted of murder in the first degree, and thereafter, June 2, 1886, his motion for a new trial having been denied, he was sentenced to be hanged. The case is made remarkable, in one respect, by recently discovered evidence which purports to be the written confession of one Henry Benhayon, brother of the deceased, in which he declares that he poisoned his sister, and that Dr. Bowers is innocent. If the events occurred as stated in the brief of appellant's counsel—and they are matters of notoriety—the facts would entitle the defendant to a new trial on the ground of newly discovered evidence, if presented in time to the court below; but they were not presented to the court below, and unfortunately could not be presented, because they occurred pending appeal. The appeal herein was taken on June 2, 1886. On October 23, 1887, the coroner received through the mail a letter which had been deposited in a postal box late the night before, which reads as follows:

"City, October 22, 1887.

"Dr. J. I. Stanton, Coroner.

"Sir: That I may not change my resolution, I send you this in advance. I am the cause of my sister's (Cecelia Bowers') death on November 1, 1885. I could not keep the horrible

secret any longer; I had to write it in a memorandum book, and I lost it. This is one of my reasons for making my exit from the world's stage. Dr. Bowers knew nothing of my ———, and had no hand in her death. No one is to blame but myself, and I take this step to relieve myself from further misery, and all concerned. I do not wish to see my mother.

"H. BENHAYON."

On receipt of this letter a search was made for the author thereof, and his body was found on the floor in the room of a lodging-house, with a bottle nearly empty, but containing poison, lying beside it. The written confession and letters which were found on a table in the room stated, in substance, that Dr. Bowers and his wife had always quarreled; that Mrs. Bowers said she would poison the doctor before he should leave her; that he (Benhayon) secured the poison with which to kill the doctor, but his sister would not listen to the proposition, and threatened to expose him; that, after his sister became sick, he felt an irresistible impulse to "use the stuff on her, and finish Bowers later"; that he took a pill and capsule out of her box, and filled the capsule with two kinds of poison, put it back, and took others, until four capsules had been poisoned and exchanged; that he did not think Bowers could get in any trouble, for the person who furnished him with the poisons said a chemist told him no doctor could find it in the stomach, for it was blood-poisoning; that he forced his sister to give him an order for her insurance policy in the F. of P., but he dare not present it. In the letter to Dr. Bowers he stated to him that Mrs. Bowers had been unfaithful, and cautioned him against certain friends, whom he charged with criminal intimacy with her. While it is admitted by counsel for appellant that ordinarily no argument could be made here upon facts occurring after appeal taken, it is urged that the evidence which has been discovered in this case "is of so grave a character, and points so strongly to the innocence of this defendant, that, however informally it may have come to the attention of the court, this or any other court of competent jurisdiction should say that he shall not be executed until it shall have been submitted, in common with other evidence in the case, to a jury of his country." But, manifestly, the court has no authority to consider these matters as thus

presented. They are no part of the record sent to us from the court below, and there is no provision of law by which newly discovered evidence may be presented to this court in the first instance. The remedy in such cases rests with the executive. He alone can afford relief.

It is claimed by counsel for appellant—and this is their leading contention—that the evidence is insufficient to justify the verdict of the jury. A determination of this question has imposed upon us an examination of all the evidence offered, the statement of which covers about twelve hundred pages of the record. It would be impractical to discuss within the limits of a judicial opinion the character, bearing, and weight of all the testimony offered by the respective parties in this case. It might be sufficient to say that the evidence is conflicting, and that it would be an invasion of the province of the jury to go into an examination of the weight of the evidence. It is claimed, however, that inasmuch as the evidence of death by poisoning is all circumstantial, and especially as it is all expert opinion testimony, the ordinary rule should be relaxed, because the untrained mind of the jury cannot be expected to comprehend or appreciate the full effect of such evidence. But this might be said in every case where the verdict is based upon expert testimony, and the judgment of this court as to the facts be substituted for that of the jury. Whatever may be the right or duty of this court to interfere with the verdict of a jury in civil cases when it deems it to be against the evidence, the constitution provides that it "shall have appellate jurisdiction, ... in all criminal cases prosecuted by an indictment or an information in a court of record on questions of law alone" (article 6, section 4); and in cases of this kind, where it appears that there is a conflict in the evidence, we are not justified in setting aside the verdict. The question is not whether the witnesses for the prosecution are less intelligent and more prejudiced than those of the defense; not whether what they said was true or false. Those are matters for the jury. The credibility of the witness and the weight of his testimony is always for the jury. Counsel for the defendant do not claim that there were no expert witnesses whose testimony was deserving of respect and weight, but it is claimed that all the expert testimony given in this case which is entitled to consideration

came from witnesses for the defendant. Their position is clearly set forth in the following frank statement by one of the defendant's attorneys: "If it shall be said that these strictures upon expert medical testimony apply to the testimony of the experts who testified in behalf of defendant as well as to that of those on behalf of the prosecution, I answer that the value of the opinion of a medical expert depends upon his intelligence, his knowledge of the subject upon which he gives his testimony, and his honesty and impartiality; and I ask the court to carefully examine the testimony of the expert witnesses for both the prosecution and defense, and determine whether these desiderata—some or all of them—are not generally absent in the testimony of the expert witnesses for the prosecution, and present, in an unusual degree, in the testimony of defendant's experts. There are expert witnesses—the exceptions, it is true—whose testimony the courts receive with favor and respect, and to whose opinion they accord the utmost deference; and some such witnesses, at least, the defendant has, I think, been fortunate in securing." The theory of the prosecution is that defendant caused the death of his wife by administering to her toxic doses of free phosphorus. This theory stands or falls upon the evidence offered as to—First, the clinical symptoms; second, the pathological conditions disclosed by the autopsy; and third, the presence of free phosphorus in the organs of the deceased, as revealed by chemical analysis.

1. The Clinical Symptoms. The clinical symptoms in phosphorus poisoning are violent cramps in the stomach, vomiting of dark green matter, a burning sensation in the stomach, and silvery white condition of the tongue and mouth, rawness of the throat, disagreeable taste in the mouth, purging, convulsions, collapse, and coma preceding death. Counsel for appellant has greatly aided us in our examination of the testimony by a synopsis thereof, in which the substance of the evidence is very fairly stated, and there is some evidence as to every clinical symptom mentioned. It is claimed, however, that the testimony of the principal witnesses for the people, as to these symptoms, is conflicting, and that the testimony of one witness nullifies that of another; but, as before stated, it is for the jury to determine from all the evidence which witness is to be accredited.

2. Pathological Conditions. There were present at the autopsy eleven physicians, all of whom testified at the trial. The pathological conditions are stated in the official report of Dr. Blach, the city physician of the city and county of San Francisco, who superintended the autopsy on the body of the deceased in pursuance of an official investigation as to the cause of her death. The report of the autopsy is as follows: "External inspection: Body of a well-nourished woman four feet eight inches in height, about one hundred and twenty-five pounds weight; rigor mortis absent; no external marks of violence. The mouth: The mucous membrane of the mouth very white and thickened. The esophagus: The mucous membrane presents a similar appearance to that of the mouth, but not so general. Body emits no odor of decomposition. The thoracic cavity: The lungs apparently normal; pericardial fluid about half an ounce, and somewhat reddened; heart weighs seven ounces, valves healthy, but walls thin; atheromatous patches on the aorta; clot of blood in the heart. Abdominal cavity: Liver weighs one pound and twelve ounces, not adherent to walls of the abdomen; capsules slightly adherent to the convex surface; the consistency of the liver soft; the stomach nearly empty; ulcer one and one-half inches from the cardiac orifice, near the greater curvature, about the size of a quarter of a dollar; the edges of the ulcer raised; the tissues of the mucous membrane of the stomach about the ulcer infiltrated with pus; extravasations of blood in the neighborhood of the ulcer; capillary hemorrhages in the fundus; pyloric extremity highly congested; mucous membrane of the stomach thickened, and of an opaque, yellowish color; intestines slightly congested. Kidneys: The right one normal; small extravasation of blood in the center of the kidney; left kidney apparently normal. Pelvic cavity: Contains three quarts of blood, partially organized; also extensive extravasation of blood in the pelvic cellular tissue; the left ovary contains a large mass of blood; the right ovary normal; left fallopian tube dilated, and contains remains of fluid exudations; right fallopian tube dilated, and filled with blood; the uterus healthy in every respect. Cranial cavity: Slight aedemia on surface of brain; brain otherwise healthy." Dr. Blach testified that he was satisfied at the autopsy there was fatty degeneration of the kidney, but did not care to say so

in his report, because it was a matter that could not be determined with certainty without a microscopic examination. Dr. Abrams, who made the examination with the microscope, testified that he found the liver in a high state of fatty degeneration. Dr. Stallard corroborates the statement. It was shown that the liver was greatly atrophied, and bore no evidence of ulceration or abscess. When the stomach was opened, some of the physicians present noticed a strong garlicky odor, which is one of the evidences of phosphorus poisoning. There was evidence showing that the ulcer in the stomach was undergoing a healing process; that the blood clots were harmless, because encysted by nature, and that these reparative processes had gone on to such an extent that the continued nausea and vomiting, which increased as the patient grew worse, could not be attributed to either the ulcer or haematocles. The physicians having found no cause of death, the stomach was removed, and given to Dr. Johnson for chemical analysis; and the heart and liver were given to Dr. Abrams for microscopic examination. Dr. Johnson testified, in substance, that he first tested the contents of the stomach for arsenic, and then for mercury, and finding no trace of either of these poisons, but having detected an alliaceous odor in the nature of garlic, he made a test for phosphorus by the Mitscherlich apparatus and process; that by this test he obtained luminosities, which were proof positive of the presence of unoxidized phosphorus; that sulphur has the property of condensing upon its surface free phosphorus; that he took the distillate (from the contents of the stomach and the intestines) in the flask, placed it in a small piece of sulphur, and then sealed it; that after heating it, the sulphur was removed, dried, and placed in the palm of his hand, and the result was a light luminosity or phosphorescence; that there was a strong alliaceous or garlicky odor from the distillate. He testified that free phosphorus is an irritant poison, and in its free form, as he found it, produces vomiting, pain in the stomach, convulsions, coma, and death; fatty degeneration of the liver being one of its accompaniments. He expressed himself as perfectly satisfied, after finding free phosphorus in the stomach, that death was caused by free phosphorus. Dr. Abrams testified that from what he observed at the autopsy, from the examination he made with the microscope, and what he saw

in assisting Dr. Johnson in his chemical analysis, that "the introduction of phosphorus or caustic poison was the cause of the death of Mrs. Bowers." Many of the expert witnesses testified that they knew of no disease that could produce all the pathological conditions described; that, while each and every one of the conditions might be the result of some natural disease, when taken separately, they could not, taken all together, be the combined results of any disease. Dr. Johnson and Professor Price both experimented with and made tests of "Fellows' Sirup of Hypophosphites," which had been given to Mrs. Bowers by her physicians, and which the defense claimed might account for the luminosity and garlicky odor, and both testified that no traces of luminosity or garlicky odor could be discovered. In short, the testimony introduced by the prosecution tended to show that it was a case of slow poisoning by the administration of free phosphorus, which produced the ulcer of the stomach by its irritant action, affected the whole mucous membrane from the mouth to the stomach, causing excessive vomiting, and fatty degeneration of the liver. The most that can be said against the verdict, so far as the evidence goes, is that it depends entirely upon circumstantial evidence, and that the evidence as to the circumstances is conflicting. But the experts were shown to be competent to speak. The jury heard their evidence, passed upon their credibility, and are the sole judges of the weight to be given to the testimony of each witness. In all cases of poisoning, except where there are eye-witnesses, the evidence is necessarily expert opinion in character; and, if the rules which are here urged were to be applied, it would be impossible to secure a conviction in any such case.

Conceding that the deceased was poisoned, as claimed by the prosecution, it is still contended that the evidence is insufficient to show that the defendant administered the poison to her; and that, if she was killed with phosphorus, there is stronger evidence to prove that some person other than defendant administered it to her than there is to prove that the defendant administered it. But here, again, follows an argument by counsel for the appellant, which is robbed of its force by the fact that there is evidence, although conflicting, as to the defendant's treatment of his wife during her lifetime, and by the fact that he expected to receive a large sum of

money upon her death. That he treated her cruelly there is abundant evidence, and as to means and opportunity to commit the crime, there is no question. So far as the intent and motive are necessary in making out the offense charged, it is sufficient to say that, in addition to evidence of cruel treatment, and declarations indicating regret on the part of the defendant that his wife was not killed in an accident which occurred while driving, and a wish that she might die, there is evidence that he secured insurance upon her life, in various societies, to the amount of seventeen thousand dollars. The fact that he had his own life insured in her favor for a like amount is a circumstance which naturally weakens the force of the argument made by the prosecution so far as the insurance upon her life bears upon the question of motive, but it was for the jury to say, from all the circumstances of the case, after they became satisfied that the deceased was killed by phosphorus, who administered it, and for what purpose. Our attention is directed to the authorities, which say that in cases of this kind the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with every other rational conclusion. This is, of course, true; and the jury were told repeatedly that the circumstances proved must exclude to a moral certainty every other hypothesis except the single one of guilt. But it does not follow that, because there is evidence tending to show that defendant did not commit the crime, the proof is consistent with the prisoner's innocence. Evidence is simply the means of proving a fact; that which tends to establish a fact. Proof is the establishment of a fact by evidence; and it is only upon the theory that the witnesses whose evidence was favorable to the defendant, and no others, are to be accredited in their opinions, that it can be said, as matter of law, the proof is consistent with innocence. The jury may not have believed any one of the witnesses for the defense in anything he said, and were not bound to say there was a reasonable doubt because the witnesses of the prosecution did not agree as to the cause of the conditions found, or the cause of the death of deceased.

At the trial a motion was made to strike out the testimony of Dr. Johnson bearing upon the chemical analysis, on the ground that there was not sufficient proof of identity of the material submitted to the witness for analysis, and upon the

further ground that proper precautions had not been taken to prevent said material from being tampered with. It appeared that the anatomical jars which held the stomach and contents, and the contents of the intestines, were covered like preserve jars, and wrapped in paper, but were not sealed at any time; were exposed during the autopsy; and were afterward locked in a case for two days in the laboratory of Cooper Medical College, to which Dr. Johnson and the janitor (who died prior to the trial) had access. Dr. Johnson was quite certain that the jars had not been touched from the time he placed them in the laboratory until he took them out again. No objection was made to the sufficiency of the evidence to identify the material at the time the doctor was examined as a witness, nor until the evidence for the prosecution in chief was all in, when the motion to strike out was made. The evidence being relevant and material, the objection came too late. But, in any event, it was for the jury to say whether it had been tampered with, or whether there was a doubt as to that fact. There were no suspicious circumstances tending to show that the jars had been tampered with; and, while those in charge did not employ the safeguards which might reasonably be expected from men who knew that the materials in their possession were to be used as evidence against a person suspected of murder by poison, yet, in the absence of some evidence tending to show that the jars were tampered with, we cannot presume that anything was added to their contents.

During the progress of the trial the court propounded to some of the expert witnesses several questions which counsel for appellant claimed were improper. We see no valid objection to the questions thus asked, except that in form they are leading and suggestive. If they assumed facts not proved, the attention of the court ought to have been directed to this objection. While it was probably not the duty of the defendant to urge his objections to questions asked by the court with the formality and persistence required when counsel for the prosecution were examining the witness, yet the attention of the court ought to have been called in some manner to the objectionable matters. It is in the discretion of the court to allow counsel to ask leading questions, and there is no reason why the court may not, of its own motion, ask questions in that form.

The conduct of the assistant district attorney in proposing to read to the jury, during his argument, a paper which had not been introduced in evidence, and in asserting that it contained the record of defendant from the chief of police of Chicago, was inexcusable and reprehensible. We think, however, that, so far as the defendant's interests were concerned, no prejudice resulted from this violation of professional duty, for it was promptly rebuked by the court at the time, and the following instruction was thereafter given: "In weighing the evidence in this case, it is important that you should bear constantly in mind that statements of fact made by counsel, whether in examination of witnesses or in argument of the facts so stated, are not in proof, are not in evidence, and are to be discarded from your consideration."

The court did not err in overruling objections to questions put to Drs. Johnson, Lane and others, calling for their opinions as to the cause of death. It is sufficient if there be some evidence in the case to support the facts stated in the hypothetical question: Regina v. Frances, 4 Cox C. C. 57; Hurst v. Railroad Co., 49 Iowa, 76; Filer v. Railroad Co., 49 N. Y. 42; Webb v. State, 9 Tex. App. 490. Some of the questions called for an opinion as to the cause of death. In cases of this kind this is permissible when the facts are stated to or by the witness. By answering this question the witness does not assume the province of the jury, and determine the precise question they are to pass upon. The question was, What caused the death? not, Who caused the death? Conner v. Stanley, 67 Cal. 316, 7 Pac. 723, cited by appellant, is clearly not in point: State v. Smith, 32 Me. 370, 54 Am. Dec. 578; Shelton v. State, 34 Tex. 664; Ebos v. State, 34 Ark. 520; Lawson, Exp. Ev., 221.

Mrs. Benhayon, a witness for the prosecution, was asked, on cross-examination, whether she was not in the habit of playing cards for money, and demanding money from her daughter for that purpose. "Evidence of particular wrongful acts is not admissible to impeach a witness" (section 2051, Code of Civil Procedure); and we cannot see the pertinency of the evidence if offered for any other purpose.

In one of the hypothetical questions asked by him, counsel for the people used the word "luminosity." The question was objected to on the ground that this word introduced a con-

clusion of fact drawn from actual facts found during the chemical analysis. The witness, Dr. Dennis, seems to have understood the meaning of the word, and no attempt was made, on cross-examination, to show that he meant any other kind of luminosity than that described by Dr. Johnson. It is a word which evidently has a definite meaning, and is well understood by medical experts when used in explaining the result of a chemical analysis.

The court did not err in allowing Dr. Lane to testify on behalf of the prosecution after the defendant had opened his case. The reasons given by the court show that there was no abuse of discretion. The same may be said of the ruling of the court in allowing the witness Price and others to testify in rebuttal: Pen. Code, sec. 1094; People v. Strong, 46 Cal. 302.

There was some evidence tending to show the existence of every fact stated by counsel for the people in the hypothetical questions propounded to Dr. Lane. It may be apparent, as claimed by counsel for defendant, that some of these facts were not proved, the weight of the evidence being strongly against them; but this does not determine whether the proper foundation has been laid for the question. It is proper to assume, within the limits of the evidence, any state of facts which the evidence justifies, and obtain the opinion of the expert. The facts are assumed for the purpose of the question only, and, of course, if the evidence fails to establish the material facts thus assumed, the jury must disregard the opinion: Regina v. Frances, supra; Lawson, Exp. Ev., 153.

The testimony of Brooks and Hogan was properly admitted. The defendant's declarations as to the conduct of his wife were evidently made to show that her death was caused by her own acts. This is clearly shown by his declaration made to the witness Hogan in the city prison. But, without a declaration by the defendant that such was his purpose, the jury might readily believe from the statement itself that it was made for the purpose of explaining the cause of her death.

A. Hogg was called as a witness, and having testified that he was a druggist, and had sold Dr. Bowers medicine several times during the last illness of Mrs. Bowers, without prescriptions therefor, said that he would not put up phosphorus in overdoses for anyone not a physician. He was asked this ques-

tion: "But if a physician called upon you for it in that way, you would put it up, wouldn't you?" Counsel for the defendant objected to the question on the ground that it was incompetent. The objection was overruled, and an exception reserved. The witness answered: "I would make some remark to the physician first, if it were an overdose, because otherwise I would be liable to get into trouble." We cannot perceive how this answer could have prejudiced the defendant's case. It was not an attempt to prove a general custom, and what Mr. Hogg would do was entirely immaterial. It was not claimed that he had sold phosphorus to Dr. Bowers.

On cross-examination the defendant was asked to name his parents. Objection was made that it was not cross-examination. The objection was overruled, and an exception taken. The defendant answered that his father's name was Matthew Minslow Bowers, and his mother's maiden name was Stump. This answer certainly did not prejudice the defendant. The same may be said of the answers given to other questions put to defendant and those asked in the cross-examination of Jenkins.

Several exceptions were taken by counsel for defendant to the rulings of the court in excluding and admitting evidence which we do not deem of sufficient importance to review in detail. It is sufficient to say that we have carefully examined them all, and found no prejudicial error in any of them.

The charge of the court as to the credibility of defendant and the weight of his testimony has been approved here several times: People v. O'Neal, 67 Cal. 378, 7 Pac. 790. That portion of the charge which counsel referred to as "an elaborate speech to the jury" might have been omitted without injury to the rights of either the prosecution or the defense, but we cannot see any prejudicial error in it. The court had given many instructions couched in very strong language, cautioning the jury against forgetting the presumptions with which the law clothed the defendant, and the certainty of proof of every element which the law required before conviction; and, in closing the charge, called the attention of the jury to the fact that the law should be fearlessly and impartially administered; that verdicts should not be dictated by any other considerations than the law and the evidence; and that, if they were satisfied beyond a reasonable doubt and to

a moral certainty of the guilt of the defendant, they would be derelict in their duty to the people of the state if they failed to say so. It would be better taste and more dignified judicial style to give the law to the jury in its simplest forms, applying such principles thereof as are applicable to the facts of the case, without lecturing the jury upon the consequences of a failure to obey the mandates of their oaths. Anything else is liable to lead the court into error, cause suspicion of prejudice against one side or the other, and give this court unnecessary labor and annoyance.

We have carefully examined the record upon every question presented by the defendant's counsel on this appeal, and we see nothing in the record which would warrant us in reversing the judgment. The judgment and order denying a new trial are affirmed.

We concur: Searls, C. J.; McFarland, J.; Sharpstein, J.; McKinstry, J.; Thornton, J.

WISE v. HOGAN.*

No. 11,147; June 20, 1888.

18 Pac. 784.

Pleading—Uncertainty.—A Complaint Alleging That Defendant's Intestate was indebted to plaintiff's intestate in the sum of five thousand dollars, for legal services rendered by plaintiff's intestate in prosecuting and defending numerous suits, drawing various instruments, consulting and advising with defendant's intestate about his business, at his request, which services are alleged to have been rendered between January 1, 1870, and October 11, 1883, is demurrable for uncertainty in not specifying the various items and the times of the rendition of such services.

APPEAL from Superior Court, Alameda County; N. Hamilton, Judge.

Action by John H. Wise, administrator of Tully R. Wise, deceased, against J. T. Hogan, administrator of Edmond

*For subsequent opinion in bank, see 77 Cal. 184, 19 Pac. 278.

Hogan, deceased, to recover for legal services rendered by plaintiff's intestate for defendant's intestate. Judgment for defendant on demurrer, and plaintiff appealed.

A. Heynemann for appellant; Henry Vrooman and J. C. Martin for respondent.

FOOTE, C.—This is an action brought to recover a sum of money for the alleged services, as an attorney at law, rendered by the plaintiff's intestate to the defendant's intestate. The complaint was demurred to, and the demurrer sustained. Thereupon, the plaintiff declining to amend his pleading, judgment was given in favor of the defendant, from which this appeal is prosecuted.

The fourth clause of the complaint stating the cause of action is as follows: "Plaintiff further alleges that said Edmond Hogan, deceased, was indebted to Tully R. Wise, deceased, on an account for services rendered by said Tully R. Wise, as attorney and counselor at law, in the sum of five thousand dollars, as such attorney and counselor at law of the said Edmond Hogan, deceased; said services were rendered between the first day of January, 1870, and the eleventh day of October, 1883; that said services consisted in prosecuting and defending numerous suits at law and equity as such attorney at law, at the request of the said Edmond Hogan, deceased; in drawing many and various instruments, and in consulting and advising said Edmond Hogan, deceased; for constant attendance in and about the business of said Edmond Hogan, deceased, at his request; that the said Edmond Hogan, deceased, has not paid the same, nor any part thereof." The second ground of the demurrer reads thus: Second. "That the said amended complaint is ambiguous and uncertain, more particularly specified in this: That it does not definitely, or with any certainty, appear therefrom what suits at law and equity were prosecuted or defended by the intestate, Tully R. Wise, deceased, or in what courts, or at what dates or times, said suits were prosecuted or defended, and it does not definitely or with any certainty appear therefrom what instruments were drawn by the said intestate, or as to what matters or upon what subjects consulting and advising were done by the said intestate, or at what times or dates said in-

struments were drawn, or said consultings and advisings had; and it does not definitely or with any certainty appear therefrom about what business of the said Edmond Hogan, deceased, the said intestate was in constant attendance; and it does not definitely or with any certainty appear therefrom what part, if any, of the said services charged in the complaint to have been rendered, or of the said indebtedness charged in the said complaint to have been incurred, was rendered or was incurred within the limit of the statute of limitations of the state of California, or within two years prior to the death of the said Edmond Hogan, deceased." We are satisfied that the demurrer was well taken, and advise that the judgment be affirmed.

We concur: Belcher, C. C.; Hayne, C.

Per CURIAM.—For the reasons given in the foregoing opinion the judgment is affirmed.

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